

August 16, 2012

Copyright Lawmaking and the Public Choice: From Legislative Battles to Private Ordering

Yafit Lev-Aretz, *Columbia Law School*

Copyright Lawmaking and the Public Choice: From Legislative Battles to Private Ordering

**Yafit Lev-Aretz*

On January 18th, 2012, the Web went dark in the largest online protest in history. Two anti-piracy Bills – The Stop Online Piracy Act (SOPA) and The Protect IP Act (PIPA) – attracted waves of opposition from the Internet community, which culminated on January 18th into an unprecedented 24-hour Web strike, followed by a decision to shelve the Bills indefinitely. This Article argues that the SOPA/PIPA protest created a new political reality in copyright lawmaking, with the tech industry becoming a very influential actor on the one hand, and social networks lowering mobilization costs of individual users on the other hand.

Through a detailed account of the SOPA/PIPA backlash, this Article is the first to revisit an established line of commentary, which has employed public choice theory to explain the perspective that corporate copyright holders have disproportionate influence on copyright lawmaking to the detriment of the general public. This Article argues that it is too soon to part ways with the public choice model in copyright lawmaking, as the applauding display of the public power in the SOPA/PIPA case was of unique context. The public should be looked at as a ‘sleeping giant’ whose potential awakening, as paramount as it may be, is merely a potential. Against the backdrop of the new political reality, this Article concludes that the tech sector and the entertainment industry are expected to expand previous resort to private ordering in the form of cross-industry partnerships. This form of private ordering, while little-discussed in legal commentary, makes perfect economic sense for corporate players, and can be as influential and effective as public legislation.

- I. INTRODUCTION
- II. THE SOPA/PIPA PROTEST
- III. THE PUBLIC CHOICE THEORY AND COPYRIGHT LAWMAKING
- IV. HERALDS OF A NEW POLITICAL ORDER
 - i. *The Rise of a Powerful Tech Lobby*
 - ii. *Social Networks Reduce Transactional Costs for Users*
- V. THE PUBLIC AS A SLEEPING GIANT
 - i. *The Global Public Rise of 2011*
 - ii. *SOPA, PIPA, and UGC*
 - iii. *A Threshold for Extensive Public Engagement*
- VI. FROM PUBLIC CHOICE TO PRIVATE ORDERING IN COPYRIGHT LAWMAKING
 - i. *Public Choice and Copyright Legislation After SOPA and PIPA*
 - ii. *Private Ordering and Copyright Policymaking After SOPA and PIPA*
- VII. CONCLUSION

I. INTRODUCTION

On January 18th, 2012, millions of people awakened to an Internet, which was not quite right. Encyclopedia giant Wikipedia, news-sharing platform Reddit, and many others blocked access to content on a 24-hour strike,¹ to symbolize their opposition to two anti-piracy Bills: The Stop Online Piracy Act (SOPA)² and its Senate companion, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA).³ The two Bills expanded the power of U.S. law enforcement to combat online trafficking in copyrighted content and counterfeit goods, by obtaining court orders to prevent advertisers and payment facilities from conducting business with infringing websites, search engines from linking to them, and Internet service providers from offering access to the sites.⁴ Hundreds of thousands of websites took part in the strike during which some were effectively closed, while others featured information about the Bills and directed users to action centers to communicate their worries to Congress.⁵ Users zealously responded and fulminated against the Bills through posts on social networks, online petitions, emails and phone calls to Congress.⁶ The protest was unanimously hailed successful, as the stated positions by members of Congress on SOPA and PIPA shifted overnight from 80 for and 31 against to 55 for and 205 against.⁷ According to the House Judiciary Committee Chairman Lamar Smith, the House of Representatives “postponed consideration of the legislation until there is wider agreement on a solution.”⁸ Senate Majority Leader Harry Reid announced that the procedural vote on PIPA, which had been scheduled to January 24th, would be postponed “in light of recent events.”⁹

A broad array of copyright scholars has used public choice theory to demonstrate the disproportionate influence copyright holders, and especially the entertainment industries,

* Intellectual Property Fellow at the Kernochan Center for Law, Media and the Arts, Columbia Law School; S.J.D. Candidate, University of Pennsylvania Law School; I am grateful to Prof. Gideon Parchomovsky for invaluable contributions and encouragement. I further thank the participants of the SJDs workshop at the University of Pennsylvania Law School for insightful comments and suggestions. Special thanks are also due to Ohad Lev-Aretz, Maayan Filmar and Nizan Geslevich-Pakin for their useful remarks. I would also like to thank the ISEF Foundation for their generosity and support, which made this project possible. The opinions addressed in this Article are solely those of the author.

¹ Ned Potter, *SOPA Blackout: Wikipedia, Google, Wired Protest ‘Internet Censorship,’* ABC NEWS (Jan. 18, 2012), <http://abcnews.go.com/blogs/technology/2012/01/sopa-blackout-wikipedia-google-wired-join-protest-against-internet-censorship/>

² Stop Online Piracy Act, H.R. 3261, 112th Cong. (2012) (SOPA).

³ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2012) (also known as the Protect IP Act or PIPA).

⁴ *Bill Summary & Status 112th Congress (2011–2012), S.968 Cosponsors*, THE LIBRARY OF CONGRESS, <http://thomas.gov/cgi-bin/bdquery/z?d112:SN00968:@@@P> [hereinafter The Library of Congress, *S.968*]; *Bill Summary & Status, 112th Congress (2011 - 2012), H.R.3261*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03261>: [hereinafter The Library of Congress, *H.R.3261*].

⁵ Potter, *supra* note 1.

⁶ *The January 18th blackout strike in numbers and screenshots*, FIGHT FOR THE FUTURE, <http://sopastrike.com/numbers/> [hereinafter – Fight For the Future, *SOPA strike numbers*].

⁷ Dan Nguyen, *SOPA Opera - Where Do Your Members of Congress Stand on SOPA and PIPA?*, PRO PUBLICA (Jan. 20, 2012), <http://projects.propublica.org/sopa/>.

⁸ Jonathan Weisman, *After an Online Firestorm, Congress Shelves Anti-piracy Bills*, N.Y. TIMES (Jan. 20, 2012), http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html?_r=1

⁹ *Id.*

have had on copyright lawmaking.¹⁰ Based on the assumption that decisions in public entities are being made by individuals attempting to advance their rational interests, public choice theory look at administrative decisions as the product of interest groups' pressure.¹¹ According to the public choice model, the lawmaking course involves organized interest groups, who compete to implement their agenda, while the outcome is dictated by relative group strength - the group with the greatest political capital is likely to wield superior influence on the process.¹² Consequentially, the market for legislation systematically produces too few laws that are conducive to the overall benefit of society (i.e., 'public goods'), while systematically delivering too many laws that allocate resources to an interested group (i.e., 'rent-seeking' laws).¹³

By applying public choice analysis to copyright lawmaking, a prominent body of copyright scholarship has argued that for virtually two decades the content industries have used their political power to extend the scope, reach, and enforcement of copyright at the expense of the general public.¹⁴ Under this line of commentary, copyright owners are a well-organized group with resources and clearly-defined interests, while the public consists of decentralized groups that suffer from collective action problems.¹⁵ The practical consequence of this disparateness is a systematic bias within the legislative process, which favors the interests of copyright owners and content industries.¹⁶ Professor Jessica Litman, who is mostly identified with the argument, has demonstrated through a typical public choice analysis how commercial interests shaped the 1976 Copyright Act, and the Digital Millennium Copyright Act ('DMCA').¹⁷ According to Litman, "[O]ur copyright laws have been written not by Congress, not by Congressional staffers, not by the copyright office or by any public servant in the executive branch, but by copyright lobbyists."¹⁸ Professor Lawrence Lessig also pointed to the influence of powerful copyright owners in the enactment of the Sonny Bono Copyright Term Extension Act,¹⁹ which extended copyright protection for all works by additional twenty years.²⁰

¹⁰ Jessica Litman, *Copyright Legislation and Technological Change*, 68 ORE. L. REV. 275 (1989) [hereinafter Litman, *Copyright Legislation*], and Lawrence Lessig, THE FUTURE OF IDEAS 85-97 (2001). [hereinafter Lessig, *The Future of Ideas*]. See *infra* part II.

¹¹ MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 7-10 (2009).

¹² Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 380 (1983).

¹³ William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory For Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988).

¹⁴ Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go From Here*, TECH PRESIDENT (Jan. 29, 2012), <http://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here> [hereinafter: Benkler, *Seven Lessons*].

¹⁵ See *infra* Part III.

¹⁶ Litman, *Copyright Legislation*, *supra* note 10. Also Jessica Litman, DIGITAL COPYRIGHT, 74 (2001) [hereinafter Litman, *Digital Copyright*].

¹⁷ Digital Millennium Copyright Act, Public L. No. 105-304, 112 Stat. 2860 (1998) (codified at [17 U.S.C. § 512](#)). Litman, *Digital Copyright*, *id.* at 74, 128-145.

¹⁸ Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENTER L.J. 337, 350-54 (2002) [hereinafter Litman, *War Stories*].

¹⁹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C.A. § 302(a)-(b) (West Supp. 1999)).

²⁰ Lawrence Lessig, FREE CULTURE 134 (2004) [hereinafter Lessig, *Free Culture*].

While the public choice theory argument has not been unanimously agreed with,²¹ the claim that the copyright industry has had an excessively forceful position in drafting copyright legislation could hardly be confuted – that is, until recently. Recently, the SOPA/PIPA protest highlighted a shift towards a new political calculus in copyright lawmaking.²² A combination of technological, social, political, and legal changes paved the way for this new balance of power. The introduction of the Internet and copying technologies has redefined the target of copyright legislation, adding technology providers and end-users to the circle of affected parties.²³ As a result, an additional powerful sector entered copyright politics – the tech industry has become an influential actor, and upped its lobbying efforts. According to a report by the Center for Responsive Politics, the computer and Internet industries spent \$125 million on lobbying in 2011, topping the \$122 million spent by the entertainment industry on the same year.²⁴ Google, for example, went from spending \$5.2 million in 2010, to \$11.4 million in 2011,²⁵ and Facebook increased its lobbying expenses by 288(!) percent compared to the previous year.²⁶ Some have viewed the SOPA/PIPA battle as the opening test of the political strength of the tech industry, which for the first time took an uncompromising stand against some of the uppermost lobbyists in Washington, including the United States Chamber of Commerce and the Motion Picture Association of America.²⁷

Federal disclosure records show that a total of 115 companies and organizations had lobbyists to work on the antipiracy Bills.²⁸ Still, the overnight transformation in lawmakers' position cannot be attributed to corporate lobbying alone.²⁹ The public protest against the Bills, which originated as a grass-roots movement in social media, blogging websites, e-mail chains and numerous message and discussion boards, successfully swayed lawmakers to oppose SOPA and PIPA.³⁰ While past copyright legislative efforts did not captivate a great deal of public attention, as more and more people started using technological means and communicating through online networks, individual users have progressively become further

²¹ This body of scholarship has been criticized for its sweeping design of the public choice argument, by other prominent scholars, as Robert Merges, who attributed the expansion of copyright to efficiency-promoting modifications. See Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 291 (2004).

²² The phrase “new political calculus” was dubbed by Yochai Benkler, Benkler, *Seven Lessons*, *supra* note 14.

²³ Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846-847 (2009).

²⁴ *Lobbying, Computers/Internet Industry Profile 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=B12&year=2011>. [hereinafter Center for Responsive Politics, *Lobbying, Computers/Internet Industry Profile 2011*].

²⁵ *Annual Lobbying by Google Inc.*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000022008&year=2011> [hereinafter Center for Responsive Politics, *Annual Lobbying by Google*].

²⁶ *Annual Lobbying by Facebook Inc.*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000033563&year=2011>.

²⁷ Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-anti-piracy-Bills.html>.

²⁸ *Id.*

²⁹ For a similar view, see Somini Sengupta, *Victory on Anti-piracy Issue Buys Internet Lobby*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/27/technology/victory-on-anti-piracy-issue-buys-internet-lobby.html>.

³⁰ Jenna Wortham, *Public Outcry Over Anti-piracy Bills Began as Grass-Roots Grumbling*, N.Y. TIMES (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/public-outcry-over-anti-piracy-Bills-began-as-grass-roots-grumbling.htm?_r=1&pagewanted=all [hereinafter Wortham, *Public Outcry began as Grass-Roots Grumbling*].

involved in the copyright debate.³¹ Technological advancements have also provided the means through which users can effectively campaign for their interests. Particularly, social and participatory media³² decreased transactional costs for collective action. With its global reach, social media, like Wikipedia and Facebook, has stimulated diffusion of information and reduced information costs, such as those associated with informing the public about the bills and their ramifications.³³ Social media has also significantly reduced organization costs for social movement actors, allowing them to mobilize action and collaborate beyond time and space constraints.³⁴ With the advent of social media, Internet users have metamorphosed from large collectivities with diffuse interests that are systematically disadvantaged in the political process, into potent advocates with proven influence over lawmakers' decisions as the SOPA/PIPA revolt indicates.

The "new model of politics"³⁵ unveiled in the SOPA/PIPA events and especially the successful uprising, contradicts fundamental public choice insights about the inability of large groups to effectively organize and influence lawmakers. It is too early, however, to abstract the public choice theory from future copyright legislative process. While the SOPA/PIPA protest attests to the rise of the tech sector and the public's ability to mobilize into effective political action, specific characteristics of the SOPA/PIPA protest indicate that the public should be looked at as a 'sleeping giant,' who may or may not be awoken to actively participate in copyright legislative debates. First, the SOPA/PIPA events were part of an uprisings wave, which was storming around the world at that time.³⁶ Personal and inspirational links to the Occupy movement in the U.S. and the Arab Spring in Africa and the Middle East testify to the place of the SOPA/PIPA events in the global trend.³⁷

Second, SOPA and PIPA purportedly threatened webhosts of user-generated content ('UGC'), such as Facebook and YouTube.³⁸ By so doing, SOPA and PIPA called into the controversy many that are apathetic to politics, but could not imagine being deprived of their right to social sharing.³⁹ The popularity of UGC, in this sense, played a major role not only in lowering collective action costs, but also in bringing Internet users another step closer to smaller political groups by condensing the interests of users during the SOPA/PIPA campaign. With the understanding that the antipiracy bills jeopardize users'

³¹ Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. Pa. L. Rev. 1831, 1837 (2009).

³² Social media is defined as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content." See Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 146 (2012).

³³ Christopher M. Mascaro & Sean P. Goggins, *Brewing up Citizen Engagement: The Coffee Party on Facebook*, COMMUNITIES & TECHNOLOGIES 2011 (2011).

³⁴ Van Laer Jeroen, & Peter Van Aelst, *Internet and Social Movement Action Repertoires: Opportunities and Limitations*, INFORMATION, COMMUNICATION & SOCIETY 1, 6 (2010).

³⁵ Benkler, *Seven Lessons*, *supra* note 14.

³⁶ See *infra* part V(i).

³⁷ *Id.*

³⁸ While shutting down mainstream and established websites has always been considered highly unlikely, under some of the drafts the language of the bills could have been interpreted widely to include such course. See Bill Keller, *Steal This Column*, N. Y. TIMES (Feb. 5, 2012), <http://www.nytimes.com/2012/02/06/opinion/steal-this-column.html?pagewanted=all>. ("Interpreted in the most draconian way, it might have criminalized innocent sites and messed with the secure plumbing of the Internet itself.")

³⁹ Ethan Zuckerman, *The Cute Cat Theory Talk at ETech*, MY HEART'S IN ACCRA (Mar. 8, 2008), <http://www.ethanzuckerman.com/blog/2008/03/08/the-cute-cat-theory-talk-at-etech/>. See also Noam Cohen, *As Blogs Are Censored, It's Kittens to the Rescue*, THE N.Y. TIMES (Jun. 21, 2009), http://www.nytimes.com/2009/06/22/technology/internet/22link.html?_r=2.

right to post pictures of their cute cats,⁴⁰ came the assurance - no great wall is greater than one's facebook wall. The potential harm to UGC networks also occasioned a vigorous alliance, which may or may not stand in the future, between UGC platforms and their users. UGC platforms, whose existence was purportedly at risk had the bills become law, had ample incentive to fight SOPA and PIPA. As the platforms' loyal customers, users were also motivated to protect UGC networks in the face of the risk brought about by the bills. Most importantly, UGC platforms functioned also as the main information source and most effective organization tool for users to fight the antipiracy bills, a fact that brought many supporters of the bills to accuse UGC webhosts for misleading the public and misusing their power.⁴¹

Third, the SOPA/PIPA opposition successfully passed the high threshold for extensive public engagement. While isolating the factors that brought about such extensive participation and forecasting the next controversy to give rise to a similar level of opposition are beyond the scope of this study, this Article argues that the volume of the protest could not replicate itself for any legislative initiative that challenges users' interests. The indifference of the public in the enactment process of current legislative proposals, some of which are said to make SOPA look "like the equivalent of a bad hair day," strongly supports this view.⁴² Furthermore, as stopping legislation from being enacted is famously simpler than enacting one, meeting the threshold for extensive public participation to promote a legislative reform would be even harder. Even if all harmful copyright bills are successfully halted by the public, until new legislation effectively changes current law, the present state would preserve the negotiated agreements of industry players back in 1976.⁴³

The public's 'sleepiness' indicates that some aspects of the public choice model remain pertinent to copyright lawmaking after SOPA and PIPA. The tech sector and the entertainment industry would compete to promote their corporate agendas against the backdrop of the sleeping giant. And while tech companies have traditionally favored weaker copyright and greater public domain,⁴⁴ they may not always share identical interests with the users community. Yet, other elements of the public choice theory do not fit in into the new political order in copyright lawmaking. Above all, users' ability to mobilize into action, even when extensive mobilization occurs sporadically, implies that the application of the public choice analysis to copyright legislation has changed drastically and can no longer stand in its classic form. The presence of the public, either when the sleeping giant awakens, or through its potential threat, bears influence on lawmakers and other interested parties. Furthermore, lower collective action costs mean the threshold for political participation has also been lowered, and more public-interest groups, which were previously excluded due to prohibitive costs, can be formed and organized to influence legislation. The political dominance of such

⁴⁰ The reference to cute cats cites the cute cat theory of Internet censorship, as presented in 2008 by Ethan Zuckerman, the director of the MIT Center for Civic Media. Zuckerman, *supra* note 39.

⁴¹ Cary Sherman, *What Wikipedia Won't Tell You*, N.Y. TIMES (Feb. 7, 2012), <http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you.html>.

⁴² Patrick S. Ryan, *The ITU and the Internet's Titanic Moment*, 2012 STAN. TECH. L. REV. 8, 2 (2012) ("in the words of a colleague, current regulatory proposals from the ITU make the Stop Online Piracy Act (SOPA)--which threatened to grant new censorship and blocking powers to the U.S. government--"look like the equivalent of a bad hair day.")

⁴³ Litman, *Digital Copyright*, *supra* note 12, at 54-69.

⁴⁴ Yuko Noguchi, *Freedom Override by Digital Rights Management Technologies: Causes in Market Mechanisms and Possible Legal Options to Keep a Better Balance*, 11 INTELL. PROP. L. BULL. 1, 45 (2006) ("[i]t has been generally accepted that technology industries, such as the industry of personal computers, consumer electronics, and technology providers, can act as agents for users.")

groups, while may not be as might as the one enjoyed by the corporate lobbies or the greater public, could still play down some of the inefficiencies the public choice theory identifies in copyright lawmaking.

To conclude the analysis, the Article argues that since promoting copyright lawmaking to the benefit of one industry or another has been further complicated, the entertainment and the tech sectors are expected to explore non-legislative venues to restructure copyright law through private ordering. Many commentators have already recognized that rightholders prefer contractual arrangements and technological protection measures to governmental policing.⁴⁵ Private ordering in copyright has manifested itself in three classes of interplays – users-industry relationship (e.g., software digital locks and end-users licensing agreements), inter-industry relationship (e.g., collective rights management organizations and other joint ventures),⁴⁶ and cross-industry relationship (e.g., business partnership between rightholders and broadband providers).⁴⁷

While the deference to private ordering in users-industry and inter-industry settings has been widely tackled in legal commentary, private ordering in cross-industry context has yet to be studied in detail. It is this relatively new form of private ordering, however, that is expected to increase in light of the new political order. Like other forms of private ordering in copyright, deference to cross-industry partnerships was prompted by the spread of digital media and broadband technology.⁴⁸ Rightholders had first attempted to fight the technological reform through massive litigation, but when that strategy failed to provide satisfactory results, rightholders started engaging in private collaborations with Internet intermediaries.⁴⁹ After the failure of the antipiracy bills executives in the entertainment industry stated that legislation is no longer an appealing route.⁵⁰ The tech sector is expected to internalize a similar realization, and accordingly to turn to cross industry partnerships to save lobbying costs, implement quicker policy adaptations to new technologies, and economize on litigation expenses. Cross industry partnerships can also offer new business opportunities to both industries, which couldn't have been carried out independently.⁵¹ The demand for formal rules as provided by the legislature, as well as litigation battles, are

⁴⁵ Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,” 97 MICH. L. REV. 462, 492 (1998). [hereinafter Cohen, The New Economic Orthodoxy].

⁴⁶ Robert Merges argues that repeat players in high-transaction-cost industries use private ordering in the form of collective rights organizations to effectively substitute their property rights for liability rules. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996). [hereinafter Merges, *Contracting into Liability Rules*] For additional examples of joint ventures see Jonathan A. Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 BERKELEY TECH. L.J. 781 (2005).

⁴⁷ Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 83 (2010).

⁴⁸ Margaret Chon, *Sticky Knowledge and Copyright*, 2011 WIS. L. REV. 177, 202-203 (2011).

⁴⁹ Bridy, *supra* note 47, at 83; Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 166 (2012). The motion picture industry also partnered with consumer electronics industry “to agree to install an access-, use-, and copy-control technology”, called “the Content Scramble System” in all DVD players.” Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP.L. 319, 335-36 (2003) [hereinafter Samuelson, *Copyright and Freedom of Expression*] (“Because of this inter-industry consortium, the motion picture industry did not need to ask Congress to require CSS to be installed in every DVD player. It simply made a private agreement with the consumer electronics industry to achieve this goal.”)

⁵⁰ Amy Chozick, *Tech and Media Elite Are Likely to Debate Piracy*, N.Y. TIMES (Jul. 9, 2012), http://www.nytimes.com/2012/07/10/business/media/tech-and-media-elite-are-likely-to-debate-piracy.html?_r=3&ref=business&pagewanted=all.

⁵¹ Lev-Aretz, *supra* note 49, at 166-168.

unlikely to be utterly discontinued.⁵² Yet, as private ordering produces an effect similar to public lawmaking while avoiding many of the inefficiencies the latter implies, including those explained by the public choice theory, previous resorts to private ordering by industry players are expected to expand in post SOPA/PIPA copyright market.

The remainder of the Article unfolds in five parts. Part II describes the SOPA/PIPA protest, from its inception until the indefinite shelving of the Bills. Part III discusses the public choice theory and its historic bearing on copyright lawmaking process. Part IV analyses the heralds of a new political order in copyright lawmaking – the rise of a powerful tech lobby, and social networks reducing collective action costs for users. Part V singles out three unique attributes of the SOPA/PIPA protest to demonstrate both the ‘sleepy’ and the ‘giant’ aspects of an extensive public outcry. Part VI continues to revisit the pertinence of the public choice theory in post SOPA/PIPA copyright lawmaking, and predicts further deference to private ordering in the form of cross-industry partnerships. A brief conclusion follows.

II. THE SOPA/PIPA PROTEST

PIPA was introduced by Senator Patrick Leahy and 11 bipartisan co-sponsors,⁵³ and enjoyed overwhelming initial support by 40 co-sponsors.⁵⁴ The bill was intended to address a long-known concern of foreign websites engaging in mass copyright violations.⁵⁵ For this aim, the legislation authorized the Justice Department to request court orders against ‘rogue websites’ dedicated to infringing of counterfeit goods, demand internet service providers or search engines to block access to such websites, and require payment processors or advertising networks to avoid conducting business with them.⁵⁶ First signs of opposition to PIPA surfaced on June and October 2011, mostly through YouTube videos.⁵⁷

On October 26th, 2011, SOPA was introduced in the House by Representative Lamar Smith and 12 co-sponsors.⁵⁸ Similar to the Senate version, SOPA was designed to expand the power of U.S. law enforcement to combat online trafficking in copyrighted content and counterfeit goods, through obtaining court orders to prevent advertisers and payment facilities from conducting business with infringing websites, search engines from linking to them, and Internet service providers from providing access to the sites.⁵⁹ The

⁵² Regardless of the newly posed challenges public lawmaking would remain a practical alternative for both industries. Jonathan Macey found that strong demand for legal rules can arise even where the norms established by private ordering are producing enviable results, Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1136 (1997) [hereinafter Macey, *Public and Private Ordering*].

⁵³ Mike Palmedo, *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (PROTECT-IP) Act Introduced in the Senate*, INFOJUSTICE.ORG (May 16, 2011), <http://infojustice.org/archives/3401>.

⁵⁴ The Library of Congress, *S.968*, *supra* note 4.

⁵⁵ *Bill Summary & Status 112th Congress (2011–2012)*, *S.968*, *CRS Summary*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/-D?d112:1:/temp/~bdmXtX:@@@D&summ2=m&/home/LegislativeData.php?n=BSS;c=112>.

⁵⁶ *Id.*

⁵⁷ For example, videos by gamers who recognized the extensive reproductions of the felony streaming provisions in PIPA were posted on YouTube beginning June 30th 2011. Another anti-PIPA video was posted to YouTube and Vimeo in October, gaining over 3 million views within the following three months – *SOPA Timeline*, FIGHT FOR THE FUTURE, <http://sopastrike.com/timeline> [hereinafter Fight For The Future, *SOPA Timeline*].

⁵⁸ *Id.*

⁵⁹ The Library of Congress, *H.R.3261*, *supra* note 4.

court could grant a temporary restraining order, a preliminary injunction, or an injunction, which could be served to the relevant entity immediately upon issue, without a-priori determination as to the subject of the order.⁶⁰ Failure to comply could prompt an injunction against the disobeying entity.⁶¹

The House Judiciary Committee held its first hearing on SOPA on November 16th, which was declared by several open Internet advocacy organizations ‘American Censorship Day.’⁶² On that day the cause gained visibility when some websites, such as Tumblr, a microblogging platform and social networking website, symbolically blacked out their front pages,⁶³ while others pasted a "Censored" banner over the site's logo.⁶⁴ Users were also exhorted to contact their elected officials through mass letter-mailing campaigns led by sites like Mozilla Foundation and EFF.⁶⁵ The American censorship day protest generated over 1 million Congress contacts, and 2 million petition signs.⁶⁶

The protest escalated on December 22nd with a thread by a Reddit member urging to transfer domains away from Go Daddy, the domain-hosting firm, for its reported support of SOPA and PIPA.⁶⁷ The boycott call was aided by Jimmy Wales, Wikipedia co-founder, who announced on Twitter that the Wikipedia domain names will move away from GoDaddy, due to their position on SOPA.⁶⁸ The response was forceful enough to convince Go Daddy to denounce SOPA and withdraw its support.⁶⁹ Another post by a Reddit user proposed to focus attention on one SOPA supporter.⁷⁰ Subsequently, Representative Paul Ryan was chosen as a primary target, prompting “Operation Pull Ryan,”⁷¹ an online campaign to either force Ryan to publically condemn SOPA, or unseat him in his 2012 reelection bid.⁷² Ryan,

⁶⁰ Hayden W. Gregory, *Congress Sets Its sights on Online Piracy of Intellectual Property: Protect IP and SOPA*, 4 NO. 4 LANDSLIDE 2 (2012).

⁶¹ *Id.*

⁶² Sarah Kessler, *Tumblr, Firefox and Reddit Censor Websites to Protest SOPA*, MASHABLE (Nov. 16, 2011), <http://mashable.com/2011/11/16/sopa-tumblr-firefox-reddit/>.

⁶³ Adam Clark Estes, *The Web Collectively Protests Congress's Censorship Law*, THE ATLANTIC WIRE (Nov. 16, 2011), <http://www.theatlanticwire.com/technology/2011/11/web-collectively-protests-congresss-censorship-law/45068/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Fight For The Future, *SOPA Timeline*, *supra* note 56.

⁶⁷ Selfprodigy, *GoDaddy supports SOPA, I'm transferring 51 domains & suggesting a move your domain day*, REDDIT (Dec. 22, 2011), http://www.reddit.com/r/politics/comments/nmnie/godaddy_supports_sopa_im_transferring_51_domains/.

⁶⁸ Jimmy Wales, “I am proud to announce that the Wikipedia domain names will move away from GoDaddy. Their position on *#sopa* is unacceptable to us,” TWITTER, (Dec. 23, 2011), https://twitter.com/jimmy_wales/status/150287579642740736.

⁶⁹ McCullagh, *id.* See also Ramona Emerson, *GoDaddy Boycott: Domain-Hosting Company Changes SOPA Stance*, THE HUFFINGTON POST (Jan. 1, 2012), http://www.huffingtonpost.com/2011/12/30/godaddy-boycott-sopa_n_1176611.html.

⁷⁰ Digitalboy, *Let's pick ONE Senator of voted for NDAA/SOPA and destroy him like we're doing for GoDaddy. Relentlessly investigate and find skeletons in his closet, money bomb is opponents, etc.*, REDDIT (Dec. 28, 2011), http://www.reddit.com/r/politics/comments/ntfzw/lets_pick_one_senator_of_voted_for_ndasopa_and/?sort=top.

⁷¹ <http://www.pullryan.com/>.

⁷² Carl Franzen, *Reddit, Still Attacking Paul Ryan, Raises \$15,000 For Challenger*, TPM (Jan. 3, 2012), <http://idealab.talkingpointsmemo.com/2012/01/reddit-still-attacking-paul-ryan-raises-15000-for-challenger.php?m=1>.

who was never a sponsor of the legislation and whose position on the bill was in fact unclear, quickly announced that he would vote against SOPA on the House floor.⁷³

On January 10th, Reddit, announced that it will black out its site for 12 hours on January 18th.⁷⁴ “The freedom, innovation, and economic opportunity that the Internet enables is in jeopardy,” said the official release by Reddit admins.⁷⁵ On the same day, Wikipedia co-founder, Jimmy Wales, asked the members of the English Wikipedia community to comment on SOPA, and specifically on the possibility of a protest blackout.⁷⁶ The following discussions contemplated various proposals for action.⁷⁷ Since Wikipedia’s neutrality has always been considered one of its cornerstones, the decision to stage a public protest of this nature was not lightly made.⁷⁸ The need for an appropriate legal infrastructure, however, prevailed over the fear of criticism.⁷⁹ And so, through a consensual decision-making process, affirmed in a vote of approximately 1,800 editors, the Wikipedia community decided in favor of a 24 hour global blackout of the English Wikipedia website on January 18th.⁸⁰

On January 13th, Representative Lamar Smith, the author of SOPA, and Senator Patrick Leahy, the author of PIPA, announced their intention to remove the Domain Name System (‘DNS’) blocking provisions of the proposed legislation.⁸¹ According to these provisions, broadband providers would be required to perform DNS redirecting of websites that a U.S. court ordered to take down for infringing copyrights or selling counterfeit goods.⁸² The bills’ opponents, however, were yet to be placated, and Sopastrike.com launched to organize the protest and the January 18th SOPA strike. On the same day, six Republican Senators requested Majority Leader Harry Reid not to hold the scheduled consideration of PIPA on January 24th, as “the process at this point is moving too quickly and this step may be premature.”⁸³ In an official blog entry posted on January 16th, the White House stated that while online piracy by foreign websites is “a serious problem that requires a serious legislative response”, it would not support legislation that “reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative

⁷³ Declan McCullagh, *Paul Ryan turns against SOPA following a Reddit-based attack*, CNET (Jan. 9, 2012), http://news.cnet.com/8301-31921_3-57355331-281/paul-ryan-turns-against-sopa-following-a-reddit-based-attack/.

⁷⁴ Reddit admins, *Stopped they must be; on this all depends*, BLOG.REDDIT (Jan. 10, 2012), <http://blog.reddit.com/2012/01/stopped-they-must-be-on-this-all.html>.

⁷⁵ *Id.*

⁷⁶ *Protests against SOPA and PIPA*, WIKIPEDIA, http://en.wikipedia.org/wiki/Protests_against_SOPA_and_PIPA#cite_ref-35. [hereinafter Wikipedia, *Protests against SOPA and PIPA*]

⁷⁷ *Id.*

⁷⁸ Sue Gardner, *English Wikipedia anti-SOPA blackout*, WIKIMEDIA FOUNDATION (Jan. 16, 2012) http://wikimediafoundation.org/wiki/English_Wikipedia_anti-SOPA_blackout.

⁷⁹ *Id.*

⁸⁰ *Id.* See also Brian X. Chen, *How Wikipedia Turned Off the Lights*, N.Y. TIMES (Jan. 18, 2012), <http://bits.blogs.nytimes.com/2012/01/18/wikipedia-blackout/> [hereinafter Chen, *Wikipedia Turned off*].

⁸¹ Greg Sandoval & Declan McCullagh, *DNS provision pulled from SOPA, victory for opponents*, CNET (Jan. 13, 2012), http://news.cnet.com/8301-31001_3-57358947-261/dns-provision-pulled-from-sopa-victory-for-opponents/.

⁸² H.R. 3261, 112th Cong. (2011), §102(c)(2)(A).

⁸³ Donny Shaw, *Six GOP Co-Sponsors of PIPA Ask Reid to Cancel Vote*, OPEN CONGRESS BLOG (Jan. 13, 2012), <http://www.opencongress.org/articles/view/2461-Six-GOP-Co-Sponsors-of-PIPA-Ask-Reid-to-Cancel-Vote>.

global Internet.”⁸⁴ The call against the bills appeared to cross professional and ideological boundaries, as on January 17th, a group of artists including Hollywood actors, Saturday Night Live comedians, comic-book authors, musicians and others joined the anti-SOPA cause through signing an open letter in opposition of the antipiracy bills.⁸⁵

The SOPA strike officially started on Wednesday, January 18th.⁸⁶ On Tuesday night, as the clock showed 9 p.m. at the Wikimedia headquarters, its operations staff activated the blackout page on the world's sixth most visited website, Wikipedia.⁸⁷ Inserting a search term directed visitors momentarily to the requested page before redirecting them to a protest page with the headline "Imagine a world without free knowledge."⁸⁸ According to an official statement released after the blackout by the Wikimedia foundation, 162 million users saw the blackout page, and over 8 million users looked up their elected officials through Wikipedia to voice their opposition to the antipiracy bills.⁸⁹ Others, such as news-sharing platform Reddit, Technology blog BoingBoing and the Mozilla foundation site also blacked out entirely, featured information about the bills, and directed users to action center.⁹⁰ A few members of Congress also took part in the strike and blacked their Congressional websites in protest.⁹¹

Additional joiners of the movement chose less drastic measure to claim solidarity, e.g., Google, who placed a black redaction box over the logo on its U.S. home page,⁹² and video-sharing website Vimeo, who displayed a window with a protest message and a “take a stand” link, that could be closed if the user wished to skip it.⁹³ Some UGC platforms, such as photo sharing site Flickr and blogging platform Wordpress, allowed users to black their content to voice their opposition to the antipiracy bills.⁹⁴

⁸⁴ Victoria Espinel, Aneesh Chopra, & Howard Schmidt, *Combating Online Piracy while Protecting an Open and Innovative Internet, Official White House Response to Stop the E-PARASITE Act. and 1 other petition*, WE THE PEOPLE (Jan. 16, 2012), <https://www.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet>.

⁸⁵ Peter Pachal, *Artists: SOPA Would Hurt More Than Help*, MASHABLE (Jan. 18, 2012), <http://mashable.com/2012/01/18/artists-against-sopa/>.

⁸⁶ Fight For The Future, *SOPA Timeline*, *supra* note 56.

⁸⁷ Chen, *Wikipedia Turned off*, *supra* note 79. See also *The 1000 most-visited sites on the web*, GOOGLE (July 2011), <http://www.google.com/adplanner/static/top1000/>.

⁸⁸ Potter, *supra* note 1.

⁸⁹ *Id.*

⁹⁰ The Mozilla foundation is the developer of the Firefox web browser. For a full list of participants see the SOPA Strike website, Fight for the Future, <http://sopastrike.com/>.

⁹¹ Representatives Anna G. Eshoo, Democrat of California who represents part of Silicon Valley, and Earl Blumenauer, Democrat of Oregon blacked their Congressional websites in protest, Jenna Wortham, *With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle*, N.Y. TIMES (Jan. 19, 2012), <http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?pagewanted=all> [hereinafter Wortham, *Web Flexes Muscle*].

⁹² National Post Staff, *Google blacks out its home page in support of Wikipedia SOPA protest*, NATIONAL POST (Jan. 18, 2012), <http://news.nationalpost.com/2012/01/18/google-blacks-out-its-home-page-to-support-of-wikipedia-sopa-protest/>.

⁹³ Vimeo *SOPA Messaging*, FLICKR, <http://www.flickr.com/photos/soxiam/6723578485/>.

⁹⁴ Flickr allowed its members to darken their photos or the photos of others for 24 hours, through a blue "Darken this photo" button placed next to the photos. A message about the antipiracy bills, and a link to Flickr's blog post was displayed in place of darkened photos, Chloe Albanesius, *Flickr SOPA Protest Lets You Black Out Photos*, PCMAG.com (Jan. 18, 2012), <http://www.pcmag.com/article2/0,2817,2399029,00.asp>, and Zack Sheppard, *Help raise awareness about PIPA & SOPA*, Flickr Blog (Jan. 18, 2012), <http://blog.flickr.net/en/2012/01/18/pipa-sopa/>. Wordpress urged its users to stand up against the bills, and offered a variety of blackout plugins through WordPress.org plugins directory for the use of bloggers who wish to darken their posts or otherwise draw attention to the protest, Jane Wells, *Internet Blackout Day on January 18*,

On Facebook, the social networking troll, anti-SOPA groups were formed,⁹⁵ and users censored content on their individual profiles to publicize their opposition.⁹⁶ Mark Zuckerberg, Facebook's CEO, spoke out against the legislation in a post on his Facebook account, saying: "We can't let poorly thought out laws get in the way of the internet's development. Facebook opposes SOPA and PIPA, and we will continue to oppose any laws that will hurt the Internet."⁹⁷

The day following the SOPA strike revealed the protest's magnitude. A total of 115,000 recorded websites participated in the protest, including 45 thousand blogs.⁹⁸ The media reported the volume of SOPA calls on Capitol Hill was heavy on the day of the strike.⁹⁹ Google said it generated at least 13 million page views to its anti-SOPA page and got 7 million people to sign its petition.¹⁰⁰ According to statistics posted to the Mozilla blog, 30 million people saw the call to action on the Mozilla Firefox browser's start page, 1.8 million visited the info page about the Bills, and the effort generated 360,000 emails to Congress.¹⁰¹ The White House blog announced that nearly 104,000 people signed petitions asking the Obama Administration to protect the Internet.¹⁰² Some non-profit organizations, including the Electronic Frontier Foundation, Fight for the Future, and Demand Progress, estimated that over 4 million emails were sent through their websites.¹⁰³ Even though Twitter did not formally participate in the strike, the antipiracy bills appeared to occupy the thoughts of many users, with approximately 2.4 million SOPA-related tweets on January 18th alone.¹⁰⁴

The overwhelming voices of opposition made it to Washington, leading lawmaker after lawmaker to renounce support for the bills. At the morning of the SOPA strike, 80 members of congress supported the legislation, and 31 opposed. Following the publicized backlash, the number of supporters dropped to 55 for SOPA and PIPA, while opposition has surged to 205 against.¹⁰⁵ Two days later, Senator Harry Reid, the majority leader, availed himself to the same medium used by the protesters, and announced on his Twitter page that

WORDPRESS.ORG (Jan. 17, 2012), <http://wordpress.org/news/2012/01/internet-blackout/>; Jane Wells, *Join Our Censorship Protest!*, WORDPRESS.COM (Jan 18th, 2012), <http://en.blog.wordpress.com/2012/01/18/join-our-censorship-protest/>.

⁹⁵ To name just a few groups: Against the Stop Online Piracy Act (SOPA) (116,099 likes), at <http://www.facebook.com/AntiSOPA>; Stop SOPA (57,883 likes) at <http://www.facebook.com/StopSopaNow>; Stop SOPA and PIPA (29,735 likes) at <http://www.facebook.com/defeat.SOPA.and.PIPA>.

⁹⁶ Catharine Smith & Ramona Emerson, *Mark Zuckerberg: 'Facebook Opposes SOPA And PIPA'*, THE HUFFINGTON POST (Jan 18th, 2012), http://www.huffingtonpost.com/2012/01/18/mark-zuckerberg-sopa_n_1214090.html. See also Mike Tuttle, *SOPA Blackout: Individual Protests On Facebook and Twitter*, WEB PRO NEWS (Jan 18th, 2012), <http://www.webpronews.com/facebook-individual-blackouts-2012-01>.

⁹⁷ Mark Zuckerberg, FACEBOOK (Jan. 18, 2012), <https://www.facebook.com/zuck/posts/10100210345757211>. The post received 562,739 likes.

⁹⁸ Fight For the Future, *SOPA strike numbers*, *supra* note 6.

⁹⁹ Timothy B. Lee, *SOPA protest by the numbers: 162M pageviews, 7 million signatures*, ARSTECHNICA (Jan. 19, 2012), <http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures/>.

¹⁰⁰ *Id.*

¹⁰¹ Josh Constine, *Mozilla's Anti-SOPA Message Reached 40 Million People*, TECHCRUNCH (Jan. 19, 2012), <http://techcrunch.com/2012/01/19/mozillas-anti-sopa-message-reached-40-million-people/>.

¹⁰² Megan Slack, *By the Numbers: 103,785*, THE WHITE HOUSE BLOG (Jan. 18, 2012), <http://www.whitehouse.gov/blog/2012/01/18/numbers-103785>.

¹⁰³ Fight For the Future, *SOPA strike numbers*, *supra* note 6.

¹⁰⁴ *Id.*

¹⁰⁵ Nguyen, *supra* note 7.

the planned ballot on the Protect IP Act would be delayed.¹⁰⁶ SOPA's sponsor, and the Republican chairman of the House Judiciary committee, Lamar Smith, followed suit, stating that consideration of the legislation will be postponed until a wider agreement on a solution is reached.¹⁰⁷ According to Smith, "I have heard from the critics and I take seriously their concerns regarding proposed legislation to address the problem of online piracy."¹⁰⁸

III. THE PUBLIC CHOICE THEORY AND COPYRIGHT LAWMAKING

The SOPA/PIPA opposition is distinct from past legislative battles in two main aspects. First, it attracted the attention of an unprecedented number of individuals, who teamed up effectively to act against a pending copyright bill. Second, the SOPA/PIPA protest marks the first time that legislation promoted by powerful copyright industry players is being practically halted through such ground-roots opposition. The successful involvement of the public in copyright lawmaking to the detriment of the entertainment industries challenges an established line of commentary that employs public choice theories to demonstrate the disproportionate influence corporate rightholders have had over copyright lawmaking.

The modern public choice theory, originated in the work of James Buchanan and Gordon Tullock,¹⁰⁹ applies economic reasoning to political institutions by analogizing regulatory decisionmaking to market decisionmaking.¹¹⁰ Prior to public choice insights, governmental decision were viewed as disconnected proceedings, and were believed to be serving the general public benefit.¹¹¹ Buchanan and Tullock challenged the traditional conception by offering a positive analysis of governmental decisionmaking, according to which groups tend to pursue special legislation to guarantee the groups own welfares.¹¹² Legislation is considered "a good demanded and supplied much as other goods,"¹¹³ thus groups with great stakes in the legislative product would dedicate resources to influence governmental transfers of wealth through rent-seeking activities.¹¹⁴ As autonomous actors, legislators are primarily motivated by their wish to be reelected, while interest groups possess useful political resources, such as financial support, public exposure, and reputation.¹¹⁵ Consequently, legislatures would use their voting privileges to garner support from dominant

¹⁰⁶ Senator Harry Reid, *In light of recent events, I have decided to postpone Tuesday's vote on the PROTECT IP Act #PIPA*, TWITTER (Jan. 20, 2012), <https://twitter.com/senatorreid/status/160367959464878080>. See also Weisman, *supra* note 8.

¹⁰⁷ *Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act*, Committee on the Judiciary, UNITED STATES HOUSE OF REPRESENTATIVE, (Jan. 20, 2012), <http://judiciary.house.gov/news/01202012.html>.

¹⁰⁸ *Id.*

¹⁰⁹ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1965).

¹¹⁰ Steven P. Croley, *Theories of Regulation Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34 (1998). While public choice theory incorporates interest group theory, social choice theory, game theory, and other subfields [see D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029 (2011)], in this Article the term 'Public Choice Theory' refers mainly to interest group theory.

¹¹¹ Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 515 (1997).

¹¹² Buchanan & Tullock, *supra* note 108, at 285-95.

¹¹³ Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

¹¹⁴ GORDON TULLOCK, *RENT SEEKING, IN THE WORLD OF ECONOMICS* 604, 604-609 (John Eatwell et al. eds., 1991). See also Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 228-230 (2012).

¹¹⁵ Peter Schuck, *Against (and For Madison): An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 572 (1997).

interest groups, and would avoid choices that may provoke opposition from those groups.¹¹⁶ Nonetheless, the cost incurred by the public due to the resulting legislation typically surpasses the special benefits to the interest group.¹¹⁷

Mancur Olson's theory of group organization further demonstrates the inefficiency of the legislative process.¹¹⁸ To effectively sway lawmakers, Olson argued, an interest group must be sufficiently dominant to attract legislative attention, and appropriately sized to eschew "free riders," who could be enjoying the statutory gain without contributing to the group.¹¹⁹ Olson provided that any group trying to obtain collective benefits for a large and diffuse body of people is unlikely to form.¹²⁰ In the improbable event that a large number of individuals manages to form a group, collective action problems, and especially information costs, organization costs, and free rider costs are likely to inhibit the group's political activity: "[T]he larger the group, the farther it will fall short of providing an optimal amount of a collective good."¹²¹ The costs associated with contributing to communal effort to promote legislation are significant, while the reward to each individual member from joining a public lobby is minor.¹²² For this reason, when the demanded benefit is collective to a large group as a whole, rational and self-interested individuals would opt to free ride instead of fostering the common interest.¹²³

Conversely, groups with a limited number of members and well-defined interests, while are too susceptible to organization difficulties, can overcome collective action hurdles more easily than their large diffuse counterparts.¹²⁴ As each individual has greater interest in gaining the public good, smaller groups would effectively use their organizational advantages to extract economic benefits, "simply because of the attraction of the collective good to the individual members."¹²⁵ In other words, the benefits small groups can acquire from their investment in advancing favorable statutory mandates frequently outbid the costs.¹²⁶ Small, organized groups are thus incentivized to offer higher bids to the political branches in order to make them more attuned to the group's interests. Those groups constantly survey lawmakers, penalizing failures to supply the group's demands, and repaying those who provide satisfactory legislation.¹²⁷ Ultimately, the interest groups whose stakes in a particular legislative outcome are the highest, would be devoting the greatest investment to secure their interest, and would normally end up obtaining favorable legislation.¹²⁸

¹¹⁶ Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 674 (2012).

¹¹⁷ DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991).

¹¹⁸ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUP* (Harvard Univ. Press 1971).

¹¹⁹ *Id.* at 9-16. A free rider is an "individual (or firm) who is 'within the protective scope of some proposed piece of legislation will benefit from its enactment whether or not he makes any contribution, financial or otherwise, to obtaining its enactment,'" RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW*, 497 (3d ed. 1986).

¹²⁰ *Id.* at 1-66.

¹²¹ *Id.* at 35.

¹²² Croley, *supra* note 109, at 36.

¹²³ *Id.* at 2.

¹²⁴ Olson, *supra* note 117, at 34-35. See also Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211, 213 (1976).

¹²⁵ Olson, *id.* at 22, and 36.

¹²⁶ Croley, *supra* note 109, at 38-39.

¹²⁷ *Id.* at 37-38 [citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11 (1971)].

¹²⁸ *Id.* at 39-40.

The decisionmaking process hosts a pluralistic dynamic, in which rival interest groups compete to achieve the best policy outcome for their benefit.¹²⁹ Lawmakers respond to those contesting interests by orchestrating middle grounds and trade-offs among the participants, and enacting legislation that reflects the equilibrium of the competing groups.¹³⁰ Special interest groups, however, do not work towards advancing the general public welfare, and their interests are typically only coincidentally aligned with those of the general public.¹³¹ Public choice theory, then, concludes that the market for legislation is a bad-functioning one, with what Olson characterized as a “systematic tendency for ‘exploitation’ of the great by the small.”¹³² Public goods that should be regularly delivered by legislatures are seldom provided because there are under-demanded on the one hand, and endow lawmakers with little political gain on the other hand.¹³³ Narrow interest groups, however, due to their organizational advantages, would effectively deform the lawmaking process to maximize their benefit in the resulting legislation while inflicting inefficiencies and costs to be incurred by society as a whole.¹³⁴ Consequently, lawmakers systematically produce too few laws that are conducive to the overall welfare of the public, while consistently delivering too many laws that allocate resources to an interested group.¹³⁵ The most pessimistic among public choice theorists also point to a never-ending cycle of governmental dysfunction – “already well-endowed groups are strategically positioned to use their access to politicians to entrench and increase those endowments.”¹³⁶ And so, the same disproportionate influences that previously generated rent-seeking statutes would frustrate future endeavors for legislative reform.¹³⁷

Over the years, a predominant group of IP scholars have invoked public choice theories to explain the expansion of U.S. copyright protection. Indeed, over the past two centuries the monopoly of copyright has enlarged considerably. The term of copyright has gradually grown from fourteen years plus a renewal term (subject to certain conditions) of fourteen years in the 1790 Act,¹³⁸ to the life of the author plus seventy years in the Sonny Bono Copyright Term Extension Act.¹³⁹ The subject matter protected by copyright has also broadened to include virtually any creative work fixed on tangible form, such as music,

¹²⁹ *Id.* at 32. See also Farber & Frickey, *supra* note 116, at 17.

¹³⁰ Farber & Frickey, *Id.*

¹³¹ Croley, *supra* note 109, at 32.

¹³² Olson, *supra* note 117, at 29 (quotations omitted).

¹³³ Eskridge, *supra* note 13, at 294.

¹³⁴ Schunk, *supra* note 114, at 580.

¹³⁵ Eskridge, *supra* note 13, at 285.

¹³⁶ Schunk, *supra* note 114, at 573.

¹³⁷ *Id.* Many scholars have tried to rebut some of the public choice principles, e.g., Abner J. Mikva, *Symposium on the Theory of Public Choice: Foreword*, 74 VA. L. REV. 167, 168 (1988); Steven Kelman, “Public Choice” and Public Spirit, 87 PUB. INT., SPRING 1987, at 80-81 (1987). Nonetheless, ubiquitous evidence of rent-seeking statutes erodes much of those arguments, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the “Nobel” Lie*, 74 VA. L. REV. 179, 186 (1988). See also the following description of public choice theory in copyright lawmaking, *infra*, part III.

¹³⁸ Copyright Act of 1790, § 1, 1 Stat. 124 (1790), reprinted in Copyright Office, Library of Congress, Bulletin No. 3 (Revised), Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright (reprinting state copyright statutes) at 22, 22.

¹³⁹ For a comprehensive description of the various extensions over the years see Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 781(2001). See also YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, 439-444 (2006) (hereinafter: Benkler, *The Wealth of Networks*).

performances, architecture, creative design, software, and Internet works.¹⁴⁰ Congress has also steadily increased the exclusive rights granted to copyright owners, from the rights of reproduction and distribution of protected works vested through the 1790 Act, to the right of reproduction, distribution, preparation of derivative works, public performance, and public display of protected works in the current Act.¹⁴¹ The remedies available against infringers expanded too, from destruction of infringing works and recovering statutory damages, to a wide range of remedial choices.¹⁴² The scope of the criminal sanctions in copyright law was accelerated too.¹⁴³

Through her book,¹⁴⁴ as well as through her many publications, Professor Jessica Litman has contributed a great deal to the scholarship about a public choice model of legislation in copyright lawmaking. Litman's historical review of copyright legislative process goes back to the enactment of the 1909 Copyright Act, which was born out of conferences convened by the Librarian of Congress.¹⁴⁵ Only representatives of interest groups, whose rights received statutory recognition, were among the invitees.¹⁴⁶ When the conferences yielded a bill, interest groups who had not been invited to the conferences expressed their disapproval of the drafted bill, and a series of negotiations among the representatives of the affected parties ensued.¹⁴⁷ The revised draft of the copyright bill embodied the resulting agreement, and was promptly enacted by Congress.¹⁴⁸ Still, under the 1909 Act authors were granted limited rights for limited times, while other rights were kept in the public hands.¹⁴⁹ It was clear that authors should enjoy the commercial value of their works to be incentivized to create more.¹⁵⁰ The copyright system, however, was designed to benefit the public at large through endowing the public with some value of the copyrighted work.¹⁵¹

The language of the 1976 Copyright Act,¹⁵² which is in effect today, was generated through the same method of negotiations.¹⁵³ The strategy included granting copyright owners expansive rights, while placating interested parties who participated in the negotiations with privilege or exemption specifically customized to their requirements, but very narrowly defined.¹⁵⁴ And so, by the time the hearings on the 1976 Act began at the

¹⁴⁰ Bell provides a detailed account of the expansion of copyright subject matter, Bell, *id.*, at 781-782. See also Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1792-99 (2002).

¹⁴¹ See 17 U.S.C.A. § 106 (Supp. V 1999). See also Bell, *id.*, at 782-783.

¹⁴² Bell, *id.*, at 783-784.

¹⁴³ To name two recent examples: The Artists' Rights and Theft Prevention Act of 2005 (Pub. L. No. 109-9, tit. I, 119 Stat. 218, 218-23,) set criminal penalties for unlicensed recording of motion pictures in theaters (§ 102, 119 Stat. at 218-20); Title II of the Enforcement of Intellectual Property Rights Act of 2008 (Pub. L. No. 110-403, 122 Stat. 4256,) reinforced criminal sanctions for repeat infringers of copyrighted works (tit. II, 122 Stat. at 4260-64.) For an in-depth analysis of this issue see Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 840 (1999), and Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 475 (2011).

¹⁴⁴ Litman, *Digital Copyright*, *supra* note 12.

¹⁴⁵ Litman, *Copyright Legislation*, *supra* note 10, at 283-88, and Litman, *Digital Copyright*, *id.*, at 35-40.

¹⁴⁶ Litman, *Copyright Legislation*, *id.*, at 284-285.

¹⁴⁷ *Id.*, at 286-287.

¹⁴⁸ *Id.*, at 287-288.

¹⁴⁹ Such as many unauthorized but utterly legal uses of copyrighted works. Litman, *War Stories*, *supra* note 18, at 342-343 (2002).

¹⁵⁰ *Id.*, at 343-344.

¹⁵¹ *Id.*

¹⁵² Pub. L. No. 94-553, 90 Stat. 2541 (1976).

¹⁵³ Litman, *Digital Copyright*, *supra* note 12, at 54-69.

¹⁵⁴ *Id.*, at 37.

House and Senate subcommittees, the parties to the pre-legislative negotiations, which included authors, publishers, and others with economic interests, had already agreed on the bill's basic form.¹⁵⁵ Being a result of informal, even secretive, dialogs among a small group of stakeholders, the language of the 1976 Act appropriates value for the benefit of those stakeholders at the expense of the public at large.¹⁵⁶ In the words of Litman, "The bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained."¹⁵⁷

The story continues with the enactment of the DMCA, which was proceeded by complicated four-year multiparty negotiations.¹⁵⁸ The old battle between electronics makers, educational institutes, libraries, and content industries was further entangled by an internal conflict between the House Commerce and Judiciary Committees.¹⁵⁹ The resulting statutory language is "long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain."¹⁶⁰ On top of all its flaws, the DMCA advances the benefit of many interest groups, including some that may have embarked on the legislative journey with high-minded objectives to strive for the benefit of the greater public.¹⁶¹ Libraries and universities, for example, who had historically endeavored to promote public interest alongside with specific limited library and university matters, were required to participate in special negotiations about library copying and distance education, thus were practically absent from major parts of the discussions that determined the general policy of the bill.¹⁶²

Professor Lawrence Lessig has also viewed copyright expansion as a typical example of rent-seeking by dominant interest groups. Lessig has pointed to the fact that while within the first one hundred and fifty years of its existence copyright duration has been extended only twice, it has been extended retrospectively eleven times in the past four decades.¹⁶³ Virtually all of the late extensions were triggered by corporate rightholders, who chose to extract rent from the legislative process through extending copyright duration instead of accommodating themselves to new technology.¹⁶⁴ Epitomizing this recurrence is Walt Disney Company, whose beloved Mickey Mouse would have fallen into the public domain if not for some well-timed extensions of the term of copyright at Disney's behest.¹⁶⁵ The enacted legislation reportedly harmed the benefit of the public by allowing right owners to demand exaggeratedly prices and by lowering the use of copyrighted material in new works.¹⁶⁶ Congress, however, responded to the rent-seeking wishes of a politically influential

¹⁵⁵ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861, 873 (1987) (hereinafter: Litman, *Copyright, Compromise, and Legislative History*).

¹⁵⁶ *Id.* at 884.

¹⁵⁷ Litman, *Copyright Legislation*, *supra* note 10, at 317.

¹⁵⁸ *Id.* at 128-145. For a historical overview of the DMCA passage, see WILLIAM W. FISHER III, PROMISE TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 90-93 (2004).

¹⁵⁹ *Id.* at 136-140.

¹⁶⁰ *Id.* at 145.

¹⁶¹ *Id.*

¹⁶² Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 315 (2009). For a different approach see Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 137 (1999) (viewing the DMCA as "the fruit of intensive lobbying by a wide range of interest groups of copyright owners, on the one hand, and, particularly, users, on the other").

¹⁶³ Lessig, *The Future of Ideas*, *supra* note 10, at 107.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

association of rightholders, and turned an adverse bill into binding law.¹⁶⁷ Disturbed by the issue, which he described as “corruption,” Lessig announced in July 2007, that he would no longer lead the fight against copyright restrictions in the Internet age, and would instead devote himself to the problem of lobbyists' undue influence over legislation.¹⁶⁸

Professor Yochai Benkler has similarly found that Congress suffers from anti-social-production-bias under the pressure of rent-seeking interest groups.¹⁶⁹ The systematic expansion of exclusive private rights at the expense of the public has sustained, because the beneficiaries of such rights are industrial players, whose focused, well-organized, and well-funded interests were effectively communicated to lawmakers during the legislative process.¹⁷⁰ As opposed to the public, these players band together easily, are highly aware of any proposed changes to the copyright system, and enjoy powerful lobbyists to confirm that such changes agree with their shares.¹⁷¹ However, the social costs of enacted legislation of this sort are diffuse, and likely to materialize only after the statute was enacted.¹⁷²

Recognizing the same deficiency in the legislative process, Professor William Patry went as far as calling interpreters of copyright statutes to disregard the legislative history, because the law has been essentially written by special interest groups:

“Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or soldout concerts, and draft legislation they expect Congress to pass without any changes... In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report.”¹⁷³

Additional scholars have followed this line of argument, pointing to the legislative bias as a typical case of the public choice theory.¹⁷⁴ Some, however, have not credited the influence special interest groups have exerted over Congress to all aspects of copyright expansion. Instead, they suggest, technology and the growing economic importance of

¹⁶⁷ Lessig, *Free Culture*, *supra* note 20, at 232. See also Lindsay Warren Bowen, Jr., *Givings and the Next Copyright Deferment*, 77 FORDHAM L. REV. 809, 821 (2008).

¹⁶⁸ Bowen, *id.* See also Noam Cohen, *Taking the Copyright Fight Into a New Arena*, N.Y. TIMES (Jul. 2, 2007), <http://www.nytimes.com/2007/07/02/business/media/02link.html>.

¹⁶⁹ Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L. J. 1472, 1491-92 (2007) (reviewing Benkler, *The Wealth of Networks*, *supra* note 138).

¹⁷⁰ Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 196 (2003).

¹⁷¹ *Id.*, at 196-197.

¹⁷² *Id.*

¹⁷³ William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).

¹⁷⁴ To name just a few: Professor Pamela Samuelson also discussed “the public choice problems presented by the current copyright law and policy-making process.” Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 1, 9-10 (2004); Professor Glynn Lunney indicated that “Congress's increasing willingness to enact into law compromises crafted between those who create, those who publish, and those who provide the means to distribute works of authorship further diminishes the political voice of copyright's consumers.” Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 898 (2001); and Professor Tom Bell mourned the future consequences of the legislative bias, “The Copyright Act may have thus fallen into a vicious cycle, empowering special thus interests to lobby for still more power, over and over again.” Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 786-87 (2001). See also Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244-47 (1996), and Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 67-70 (2001).

information required the expansion of copyright to allow the market to function efficiently.¹⁷⁵ Even these scholars, however, concede that while some copyright statutes can be justified on efficiency grounds, some can certainly not. Professor Robert Merges, for example, contended that the high volume of interest groups action in the legislative arena, by itself, is not necessarily disturbing.¹⁷⁶ After all “it stands to reason that interest groups would increase their spending on lobbying, just as they would in any area with a growing impact on the bottom line.”¹⁷⁷ Still, Merges identified at least one example of “almost pure rent-seeking legislation” in the Copyright Term Extension Act,¹⁷⁸ and concludes that increased judicial intervention in pure rent-seeking legislation should be considered in such cases.¹⁷⁹

IV. HERALDS OF A NEW POLITICAL ORDER

The previous section highlighted the forceful position the entertainment industries have had in copyright legislative process. The success of the SOPA/PIPA campaign, however, has spawned discussions about a new political order.¹⁸⁰ Indeed, attempts by the public to contest unfavorable copyright legislation are not without precedent. In the 1980s, against the backdrop of the Sony Betamax cast pending before the Supreme Court, consumer groups lobbied against outlawing personal use copying.¹⁸¹ A decade later, an exemption for noncommercial copying of sound recordings was enacted as a result of similar lobbying.¹⁸² Moreover, the SOPA blackout was not the first Internet blackout actuated by a detrimental legislative action. The ‘Turn the Web Black’ protest, also known as ‘Black Thursday’, took place on February 1st, 1996,¹⁸³ during which for 48 hours hundreds of webmasters blacked their webpages in protest of the Communications Decency Act of 1996 (‘CDA’).¹⁸⁴ Under the CDA, indecent and obscene communications previously accessible on the Internet as well as the transmission of obscene or indecent communications to any person under the age of eighteen were outlawed.¹⁸⁵ Followed by the lead of the Voters Telecomm Watch and the Center For Democracy and Technology, thousands of websites, including major ones like Yahoo, joined the protest to voice their opposition to the bill’s restrictions on free speech on the Internet.¹⁸⁶ This Internet strike, as opposed to the one instigated 16 years later, bore no fruits.¹⁸⁷

¹⁷⁵ Professor Tim Wu mentions Professor Paul Goldstein and Professor Robert Merges as part of the optimistic depictions of the evolution of copyright in the twentieth-century, *Wu*, *supra* note 21, at 291.

¹⁷⁶ Robert Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2235 (2000).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, at 2236-2237.

¹⁷⁹ *Id.*, at 2205.

¹⁸⁰ Benkler, *Seven Lessons*, *supra* note 14.

¹⁸¹ Pamela Samuelson, *Toward a “New Deal” for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1500 (2002).

¹⁸² *Id.*

¹⁸³ *Black World Wide Web protest*, WIKIPEDIA, [HTTP://EN.WIKIPEDIA.ORG/WIKI/BLACK_WORLD_WIDE_WEB_PROTEST](http://en.wikipedia.org/wiki/Black_World_Wide_Web_protest). See also Joel Snyder, *Too Little, Too Late*, Reprinted from INTERNET WORLD MAGAZINE VOL. 7 NO. 5, (C) 1996, <http://www.opus1.com/www/jms/iw-may96.html>.

¹⁸⁴ Pub. L. No. 104-104, § 502(2)(d), 110 Stat. 133, 133-36 (1996) (to be codified at 47 U.S.C. § 223 (a) to (h)). The CDA was part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁸⁵ See § 502(2)(d), 110 Stat. at 133-34.

¹⁸⁶ Snyder, *supra* note 182.

¹⁸⁷ The CDA, however, did not live for long as the Supreme Court ruled it unconstitutional in *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

Being labeled as “a new model of politics,”¹⁸⁸ the SOPA/PIPA campaign challenges an established line of commentary assigning the public choice theory to copyright lawmaking. The new political order, which was revealed in the SOPA/PIPA events, is rooted in technological, political, legal, and social changes leading to an altered balance of power due to the arrival of additional players attempting to impact the legislative process. The advent of the Internet and the ability to make copies at low costs has changed the target of copyright legislation. On top of professionals and old media, whose actions have been traditionally reactive to copyright laws, technology providers and end-users have in recent years joined the circle of affected parties.¹⁸⁹ And at the same time that the tech sector has grown to become a much influential player, users have been empowered by social media to spread information, connect, and mobilize into action on issues they care about.

i. The Rise of a Powerful Tech Lobby

Throughout history copyright law has been modified in response to new technology that made the reproduction and distribution of preexisting works easier. Every new innovation, starting with the printing press in the fifteenth century, and followed by later inventions such as the photograph, radio, and television, has forced reconsideration and adaptation of copyright principles to a new reality.¹⁹⁰ However, within the first 200 years of copyright’s existence, the law has been aimed at reconciling interests of a limited number of parties.¹⁹¹ As long as the production of a copy was contingent on access to a printing press, anyone without such access could not copy, thus was not at the reach of copyright law.¹⁹² The introduction of home copying devices and digital forms of copyrighted works attracted providers of these technologies into the scope of copyright debates.¹⁹³

Concurrently, the tech industry has gained more and more power, turning from a collection of low budget start-ups into a significant sector with some well-funded actors within the copyright market. During the first days of the Internet, the tech industry happily ignored Washington policy debates, and preferred to foster the growth of tech powerhouses without government interference.¹⁹⁴ Nevertheless, when major technology companies found themselves on the sharp end of copyright, they have started paying closer attention to copyright legislation.¹⁹⁵ A recent report by the Center for Responsive Politics shows that not only the computer and Internet industries are very much present in the lobbying field, but their \$125 million spending on lobbying in 2011 have surpassed the \$122 million paid by the traditional copyright industries on the same year.¹⁹⁶ Furthermore, the amount spent by tech companies on lobbying has demonstrated constant rise in recent years, and particularly in

¹⁸⁸ Benkler, *Seven Lessons*, supra note 14.

¹⁸⁹ Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846-847 (2009).

¹⁹⁰ Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 365 (2004).

¹⁹¹ Christopher Jensen, Note, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 543-44 (2003).

¹⁹² *Id.*

¹⁹³ Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 487-488 (2000). See also PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 196 (1994).

¹⁹⁴ April Dembosky, *Silicon Valley learns fast in game of lobbying*, FINANCIAL TIMES (Jan. 18, 2012), <http://www.ft.com/intl/cms/s/2/f426700a-41f5-11e1-a1bf-00144feab49a.html?ftcamp=rss#axzz1jwJ6o4vO>.

¹⁹⁵ Greg Lastowka, *Innovative Copyright*, 109 MICH. L. REV. 1011, 1026 (2011).

¹⁹⁶ Center for Responsive Politics, *Lobbying, Computers/Internet Industry Profile 2011*, supra note 24.

2011.¹⁹⁷ The top lobbyist in the computer sector, Google, went from spending \$80,000 in 2003, to \$5.2 million in 2010, and \$11.4 million in 2011.¹⁹⁸ The lobbying expenses of social media giant, Facebook, have already reached \$1.6 million in the first half of 2012, placing it on a path to more than double the \$1.35 million it spent on 2011.¹⁹⁹ Even the Wikimedia Foundation, parent of Wikipedia, registered in 2011 to lobby for the first time.²⁰⁰ The computer and Internet industry is also reported to field 246 lobbyists during 2011, which slightly tops the 241 lobbyists deployed by the TV, music and movie industry during the same year.²⁰¹

While these numbers validate the growing political power of the tech sector, they refer to the total amount spent on lobbying by tech companies, and not to lobbying expenses on copyright related issues. In the lobbying challenge of SOPA, traditional media companies were outspending the tech industry by greater than four to one ratio – with old media according \$2 million in campaign contributions to 32 supporters of SOPA, as opposed to less than \$336,000 received by SOPA opponents from the tech industry.²⁰² The entertainment industry is also reported to offer free screenings of popular movies, and to sponsor parties for congressional staff, hosted by celebrities.²⁰³ Alexis Ohanian, Reddit co-founder, referred to the SOPA/PIPA events as “the first time the tech community as a whole, including all the tech folks beyond Silicon Valley, have really come to realize how things work in D.C.” Even though this realization came after the proposed bills had been discussed for months and were practically written, the tech industry is said to be catching up fast to the lobbying game the entertainment lobby have dominated for a long time.²⁰⁴ In this sense, the battle surrounding the antipiracy bills represents a turning point for both the tech sector, which recognized the importance of copyright lobbying and successfully entered the game, and the entertainment sector, which is no longer the predominant corporate lobbying power in copyright legislative arena.

ii. Social Networks Reduce Transactional Costs for Users

Together with the tech industries, individual users have gradually become more and more interested in the copyright debate as well. Software programs that can create and copy music, documents, and art are now in the hands of countless users, who use the technology

¹⁹⁷ *Id.*

¹⁹⁸ Center for Responsive Politics, *Annual Lobbying by Google*, *supra* note 25. See also Melissa Daniels, *Playing Politics: Who's Spending in Silicon Valley*, MOBILEIDIA (Apr. 13, 2012), <http://www.mobileidia.com/news/137729.html>.

¹⁹⁹ Emil Protalinski, *Facebook breaks its lobbying record in Q2 2012*, CNET, http://news.cnet.com/8301-1023_3-57477457-93/facebook-breaks-its-lobbying-record-in-q2-2012/.

²⁰⁰ Although it spent a minimal \$10,000, Viveca Novak, *SOPA and PIPA Spur Lobbying Spike*, OPENSECRETS BLOG (Jan. 26, 2012), <http://www.opensecrets.org/news/2012/01/sopa-and-pipa-create-lobbying-spike.html>.

²⁰¹ *Id.* Among lobbyists for both sides were former judiciary staffers, Keenan Steiner, *SOPA revolvers: Sixteen former Judiciary staffers lobby on online copyright issues*, SUNLIGHT FOUNDATION (Dec. 14, 2011), <http://reporting.sunlightfoundation.com/2011/sopa-sleuths/>.

²⁰² Jeffrey Ernst Friedman, *Entertainment Media Outspends Internet Companies on the Campaigns of Representatives Marking Up SOPA (Anti-Piracy Bill)*, MAPLIGHT (Dec. 20, 2011), <http://maplight.org/content/72899>.

²⁰³ Lee Fang, *Lobbyists Bribe Congress With a Free Screening of 'The Dark Knight Rises'*, THE NATION (Jul. 23, 2012), <http://www.thenation.com/blog/169013/lobbyists-bribed-congress-free-screening-dark-knight-rises#>.

²⁰⁴ Michael Crowley, *Washington SOPA Opera: Lobbying Power Shifts from Hollywood to Silicon Valley*, TIME (Jan. 20, 2012), <http://swampland.time.com/2012/01/20/washington-sopa-opera-lobbying-power-shifts-from-hollywood-to-silicon-valley/>.

in the same way upscale studios previously did.²⁰⁵ And while the digital era has provided users with access to professional creating, reproducing, and editing tools at low or no cost, the Internet has allowed users' uploaded content to enjoy mass exposure through dissemination on a large scale. Alongside the endless possibilities the Internet bestowed upon users came great copyright concerns involving the acts of users, which have become the target for both legal actions and calls for legislative reform.²⁰⁶ In the wake of immense criticism over suing individual users, efforts were concentrated on advancing new legislation to better address direct copyright infringement by users.²⁰⁷

As detailed above, past copyright legislative attempts generally failed to attract much public interest. The rise of the Internet and digital technology has changed the public indifference in two significant ways. First, as technology developments always precede legal reactions, by the time the legal answer to the new technology is found and agreed upon, users of that technology are no longer neutral bystanders.²⁰⁸ Instead, they have already internalize the use of the new technology, thus feeling deprived of what has come to be their 'right,' when a previously free use turns unlawful.²⁰⁹ Second, the rise of the Internet, and especially the advent of social and participatory media, has facilitated and accelerated collective action.²¹⁰ In the past mobilizing the public to protest was often prohibitively expensive.²¹¹ Today, however, with the Internet lowering the resource threshold for group formation and collective action, even small, poorly-funded groups can successfully lead public mobilization.²¹² For example, past expensive traditional mass media (e.g., television) can now be substituted or supplemented by alternative advertising mediums with vast publicity potential (e.g., designated websites, blogs, or even email chains).²¹³ Specifically, social media lowered two forms of transaction costs previously faced by users wishing to team up for action - information costs, and organization costs.²¹⁴ Information costs are defined as the costs of recognizing the ramifications of a certain matter on an individual's personal welfare.²¹⁵ Organization costs are defined as the costs of detecting likewise situated individuals and inducing them to contribute to an attempt to change a particular outcome.²¹⁶

Social media is one of the predominant channels for people to share information. Prior to the Internet, two sorts of media were available - One-Way Media (also known as Broadcast Media), and Two-Way Media (also known as Communications Media).²¹⁷ One-

²⁰⁵ Deborah Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH L. 921, 929 (2009).

²⁰⁶ Ben Depoorter, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1259 (2011) (describing how growing online infringement led the entertainment industry to target individual users of file-sharing technologies.)

²⁰⁷ Andrew C. Humes, *Day the Music Died: The RIAA Sues Its Consumers*, 38 IND. L. REV. 257 (2005).

²⁰⁸ Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1837 (2009).

²⁰⁹ *Id.*

²¹⁰ DANIEL BENNETT & PAM FIELDING, *THE NET EFFECT* (1999).

²¹¹ Young Mie Kim, *Organized Interests' Collective Action in the New Information Environment*, Working Paper, 8, <http://users.polisci.wisc.edu/apw/archives/YoungMieKim.pdf> (2010)

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Bruce Bimber, *Information and political engagement in America: The search for effects of information technology at the individual level*, POLITICAL RESEARCH QUARTERLY, 54(1), 53-67.

²¹⁵ Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1079 (1998).

²¹⁶ *Id.*

²¹⁷ Bernie Hogan & Anabel Quan-Haase, *Persistence and China in Social Media*, 30 BULLETIN OF SCIENCE, TECHNOLOGY & SOCIETY, 309, 310-311 (2010). See also CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS*, 86-90 (2008).

Way Media includes newspapers, radio, and television, which support one-directional transference of information, typically from a central source to a wide-ranging audience.²¹⁸ Two-Way Media refers to interactive communication between two individuals or a small group, such as through telephone and telegrams.²¹⁹ These traditional communication patterns offered people either one-to-many or one-to-one (or one-to-a few) types of communication.²²⁰ The emergence of social media, however, gave rise to the many-to-many communication pattern, which incorporates the broad audience element of One-Way Media with the interactive quality of the Two-Way Media, thus generating a model of citizen engagement and collective information-sharing.²²¹ Thanks to social media's communication capabilities and its lack of fixedness, information diffusion has reached a new pace, beyond time, space, and cost constraints.²²² Access to information leads to the establishment of political opinions through conversation and discussion.²²³ By providing more and more citizens with access to real-time information, social media has changed the way individuals develop political stances, and allowed more people than ever to conceive and voice civil opinions.²²⁴ Furthermore, the information communicated via social networks is typically more specialized and issue-oriented, thus effectively conveyed to the relevant interested individuals within the public.²²⁵

Through furthering many-to-many communication social networks empower the implementation of decentralized and non-hierarchical organizational formations, thus facilitating grassroots movement of collective action.²²⁶ In the classical model of institutional organization, the organization best functions through hierarchy - each member is essential for communication between the various levels, and each member must fulfill her duties to allow others to complete theirs.²²⁷ The Internet, however, has lowered the costs of collective action, so that group undertakings, which in the past necessitated central coordination and hierarchy, can now be preformed through various methods of coordination.²²⁸ And so, by offering free and efficient communication and cascade effect, social media successfully

²¹⁸ *Id.*

²¹⁹ *Id.* See also Shaked Spier, *Collectiveaction2.0: The Impact of ICT-Based Social Media on Collective Action – Difference in Degree or Difference in Kind?*, (2011), Available at SSRN: <http://ssrn.com/abstract=1979312>.

²²⁰ Spier, *id.*

²²¹ *Id.*

²²² Carrie O'Connell, *Network Theory and Political Revolution: A Case Study of the Role of Social Media in the Diffusion of Political Revolution in Egypt*, Unpublished paper presented at The Student Research Symposium, San Diego, CA (2012) http://sdsu.academia.edu/CarrieOConnell/Papers/644629/Network_Theory_and_Political_Revolution_A_Case_Study_of_the_Role_of_Social_Media_in_the_Diffusion_of_Political_Revolution_in_Egypt. For an interesting case study about information diffusion on social media see Sheldon Levine, *How Fast the News Spreads Through Social Media*, SYSOMOS BLOG (May 2, 2011), <http://blog.sysomos.com/2011/05/02/how-fast-the-news-spreads-through-social-media/> (demonstrating the pace of news spread on social media through tracking activity related to the story of Bin-Laden's death.)

²²³ Joseph, *supra* note 32, at 153.

²²⁴ *Id.*, at 152.

²²⁵ Kim, *supra* note 210, at 12.

²²⁶ R. Kelly Garrett, *Protest in an Information Society: A Review of Literature on Social Movements and New ICTs*, INFORMATION, COMMUNICATION & SOCIETY, 9 (2), 202-224 (2006). See also generally PETER DAHLGREN, MEDIA AND POLITICAL ENGAGEMENT: CITIZENS, COMMUNICATION AND DEMOCRACY (COMMUNICATION, SOCIETY AND POLITICS) (2009).

²²⁷ Shirky, *supra* note 216, at 25-54.

²²⁸ *Id.*

allows large groups of individuals to mobilize into action, with neither a regulating structure nor the costs previously associated with such action.²²⁹

As social networks draw citizenry attention and endow the public with geographically-independent organization means, new forms of virtual political organization began to surface, such as issue entrepreneurship and deliberative discourse.²³⁰ Facebook Groups, which are frequently associated with civic engagement, often commence as an individual initiative.²³¹ In Ukraine and Iran, where media freedom is limited, the Internet, and particularly social media, have been used to mobilize individuals into political action.²³² Customers have utilized social media to stop disadvantageous acts by private corporations, such as the outcry that forced Verizon Wireless to reverse its proposed "convenience fee" less than 24 hours after announcing it.²³³ Even social networks themselves are affected by the revolution they have come to generate – facebook's members have effectively employed the platform to protest changes to the website.²³⁴

Last, the rise of the Internet and social media is also said to reduce collective action dilemmas for individuals, and especially the incentive to free ride.²³⁵ Social media blurs the distinction between public and private, as individuals constantly share personal observations and private information via social networks, sometimes with relatively minimal understanding as to how their information may be used, and by whom.²³⁶ By vaguely redefining the line between public and private domains social networks mitigate the free-rider problem, which has been endemic to collective action.²³⁷ Recent social science commentary and economic literature have been attempting to redefine the classic binary free-riding decision metric to explain, *inter alia*, why individuals contribute publicly valuable information online via interactive process.²³⁸ In the digital era, people are less motivated to exercise the cost-benefit analysis, which previously grounded rational choices to free ride, when contemplating the contribution of a private matter to the public sphere.²³⁹ As private contributions often automatically publicized, "free riding by withholding individual

²²⁹ Dahlgren, *supra* note 225, at 190-200. For a different view see Malcolm Gladwell, *Small Change*, NEW YORKER (Oct. 4, 2010), http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell ("Because networks don't have a centralized leadership structure and clear lines of authority, they have real difficulty reaching consensus and setting goals. They can't think strategically; they are chronically prone to conflict and error. How do you make difficult choices about tactics or strategy or philosophical direction when everyone has an equal say?").

²³⁰ Mascaro & Goggins, *supra* note 33 ("According to Agre, the "Issue Entrepreneur" is an individual situated in a network, who proliferates the existence of an issue and information about it to a network of others. Agre contends that these networks exist in the national, local, institutional and ideological contexts. Individuals in each of these respective lattices will tend to network with others in their lattices that have an interest in the same issue, contributing to the formation of a four-dimensional network").

²³¹ Jonathan Obar, Paul Zube, & Cliff Lampe, *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action*, 2 JOURNAL OF INFORMATION POLICY 1 (2012).

²³² Mascaro & Goggins, *supra* note 33.

²³³ Brian X. Chen & Ron Lieber, *Verizon Drops Plan for \$2 Fee on Some Bill Payments*, N.Y. TIMES (Dec. 30, 2011), <http://bits.blogs.nytimes.com/2011/12/30/verizon-backtracks-on-plan-for-2-convenience-fee/>.

²³⁴ Mascaro & Goggins, *supra* note 33.

²³⁵ Bruce Bimber, Andrew Flanagin, & Cynthia Stohl, *Reconceptualizing collective action in the contemporary media environment*, COMMUNICATION THEORY 15 (4) 365, 373 (2005). See also Kim, *supra* note 210, 1t 10.

²³⁶ Bimber, Flanagin, & Stohl, *Id.*

²³⁷ Kim, *supra* note 210, at 10.

²³⁸ *Id.*, at 371.

²³⁹ *Id.*

contributions can in some cases actually become more effortful than contributing information would be.”²⁴⁰

V. THE PUBLIC AS A SLEEPING GIANT

The preceding discussion described two major developments that set the ground for the unique SOPA/PIPA opposition - the rise of a powerful tech lobby, which quickly kept pace with traditional media lobby, alongside the public effectively organizing collective action through social media. These developments may signal that the public choice theory is no longer applicable in the context of copyright lawmaking. In the days following the SOPA strike Internet activists celebrated the future of copyright with sheer optimism. As one blogger noted: “The American public has been roused and they are gathering their numbers and strategy to make sure members of Congress know and understand that the voters, not the content industry lobbyists, call the shots.”²⁴¹

Copyright political reality has undoubtedly changed. Indeed, the public, which used to be systematically disadvantaged in copyright political process, has transformed into potent advocate with proven influence over lawmakers’ decisions. This transformation contradicts basic public choice insights about the public’s inability to effectively organize. And social media would not only be here for days to come, but would also evolve into an even more efficient facilitator of collective action. Still, while repudiating the rise of a new political calculus would be mistaken, crowning the public as the new emperor of copyright could also be proven fallacious. When looking at the future of copyright lawmaking, and reflecting on the demise of the public choice model, one must accurately define the place of the public within copyright politics map. For this purpose, the exceptionality of the SOPA/PIPA protest must be appreciated. Especially, three unique attributes of the SOPA/PIPA outcry – the SOPA/PIPA protest as a part of a global public rise, the antipiracy bills’ detrimental effect over UGC, and the high threshold for extensive public engagement – all suggest that the future holds no permanent public influence in copyright lawmaking. Instead, the public should be looked at as a ‘sleeping giant,’ who may or may not be awoken to actively participate in copyright legislative debates. In this sense, the sleeping giant is composed of two faces – it is ‘sleepy’ – thus unless rousing, its existence constitutes merely a potential threat, but it is also ‘giant’ – thus immensely forceful and persuasive.

i. *The Global Public Rise of 2011*

The expression of public outrage as evidenced by the SOPA/PIPA backlash cannot be disconnected from its historical context. In 2011, Time Magazine chose “The Protester,” as its “Person of the Year,” announcing that “In 2011, protesters didn’t just voice their complaints; they changed the world.”²⁴² Numerous publicized protests were cropping up globally during 2011 – from the revolutionary wave of the Arab Spring to the Occupy movement around the world.²⁴³ Each of these protests demanded political and economic reform, and organized with the help of social media. A recent study found that discussions

²⁴⁰ Bimber, Flanagan, & Stohl, *supra* note 234, at 373.

²⁴¹ Semil Shah, *The Dawn of Social Lobbying*, TECHCRUNCH (Jan. 20, 2012), <http://techcrunch.com/2012/01/20/the-dawn-of-social-lobbying/>.

²⁴² Kurt Anderson, *The Protester*, TIME (Dec. 14, 2011), <http://www.time.com/time/person-of-the-year/2011/>.

²⁴³ Gideon Rachman, *2011, the year of global indignation*, FINANCIAL TIMES (Aug. 29, 2011), <http://www.ft.com/intl/cms/s/0/36339ee2-cf40-11e0-b6d4-00144feabdc0.html#axzz21jloVyI9>. See also Nouriel Roubini, *World Class Warfare*, SLATE (Oct. 13, 2011), http://www.slate.com/articles/business/moneybox/2011/10/what_occupy_wall_street_the_arab_spring_the_chilean_students_and.html.

about political uprising on social media often preceded major events in the Arab Spring, and encouraging stories of protest were communicated across geographical borders.²⁴⁴ The inspiration from abroad was swiftly translated into action, leading individuals in other countries to pick up the conversation.²⁴⁵ When protesters of Occupy Wall Street took over Manhattan, the link to the Arab Spring was immediately inferred. Some reported actual connections between the organizers of both protests,²⁴⁶ while some described how the “Occupiers” borrowed tactics,²⁴⁷ and drew inspiration from the Arab Spring.²⁴⁸ Some have even referred to the movement as the “American Fall” or “American Autumn.”²⁴⁹

The same motivational effect, or at least parts of it, materialized in the SOPA/PIPA protest, which began slightly after the commencement of the Occupy Wall Street events. Organizations previously associated with the Occupy Wall Street protests, such as MoveOn.org, actively revolted against the antipiracy bills.²⁵⁰ The NYC General Assembly, which organized and set the vision for the Occupy Wall Street movement posted a passionate statement against SOPA on its website.²⁵¹ Some of the Occupy Wall Street sites, including OccupyWallSt.org, blacked their website on the SOPA strike day.²⁵² The global

²⁴⁴ Muzammil M. Hussain & Philip N. Howard, *Opening Closed Regimes: Civil Society, Information Infrastructure, and Political Islam*, in *COMPARING DIGITAL POLITICS: CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION*, Cambridge University Press, (in press). Available at http://dl.dropbox.com/u/12947477/publications/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPL.pdf

²⁴⁵ Catherine O'Donnell, *New study quantifies use of social media in Arab Spring*, UNIVERSITY OF WASHINGTON NEWS (Sep. 12, 2011), <http://www.washington.edu/news/articles/new-study-quantifies-use-of-social-media-in-arab-spring>.

²⁴⁶ Adam Clark Estes, *How Occupy Influenced Egypt's Arab Spring (and Vice Versa)*, THE ATLANTIC (Dec. 16, 2011), <http://www.theatlanticwire.com/global/2011/12/how-occupy-influenced-egypts-arab-spring-vice-versa/46334/> (“Occupy organizers and those behind the Arab Spring have not only been taking queues from each other and borrowing brands, they've actually been collaborating.”) See also Sal Gentile, *Egyptians march in support of Occupy Wall Street. Are there parallels with the Arab Spring?*, PBS (Oct. 28, 2011), <http://www.pbs.org/wnet/need-to-know/the-daily-need/egyptians-march-in-support-of-occupy-wall-street-are-there-parallels-with-the-arab-spring/12147/>.

²⁴⁷ Mitchell Hartman, *Did the Arab Spring spark the 'Occupy' movement?*, MARKETPLACE (Jan. 24, 2012), <http://www.marketplace.org/topics/life/did-arab-spring-spark-occupy-movement>.

²⁴⁸ TJ Winick, *Occupy Wall Street Protesters: We Are Americans*, ABC News (Oct. 2, 2011), http://abcnews.go.com/US/occupy-wall-street-protesters-americans/story?id=14652698#_UBFjDWgm8IK.

²⁴⁹ Stephanie Condon, *After "Arab Spring," liberal groups say it's time for "American Autumn,"* CBS NEWS (Oct. 4, 2011), http://www.cbsnews.com/8301-503544_162-20115566-503544.html, and Ayman Mohyeldin, *From the Arab Spring to the American Fall?*, TIME (Oct. 12, 2011), <http://ideas.time.com/2011/10/12/from-the-arab-spring-to-the-american-fall/>.

²⁵⁰ Sean Captain, *Occupy SOPA: Inside the New York Protests*, TECH NEWS DAILY (Jan. 19, 2011), <http://www.technewsdaily.com/3638-occupy-sopa-york-protests.html> See also Danny Goldberg, *Hysterical over SOPA for all the wrong reasons*, CBS NEWS (Jan. 25, 2012), http://www.cbsnews.com/8301-215_162-57365620/hysterical-over-sopa-for-all-the-wrong-reasons/.

²⁵¹ *Statement Against SOPA*, NEW YORK CITY GENERAL ASSEMBLY, <http://www.nycga.net/sopa/>. Many have compared the SOPA strike with Occupy Wall Street (see for example Bruce Gorton, *SOPA, censorship and Wall Street*, TIMES, (Nov. 22, 2011), <http://www.timeslive.co.za/opinion/2011/11/22/sopa-censorship-and-wall-street>), just as the Occupy Wall Street started as a single blog post inspired by the Arab Spring (see Bill Chappell, *Occupy Wall Street: From A Blog Post To A Movement*, NPR (Oct. 20, 2011), <http://www.npr.org/2011/10/20/141530025/occupy-wall-street-from-a-blog-post-to-a-movement>. See also, *Wall Street Action Part of Global "Arab Spring"?*, (Oct. 11, 2011), REUTERS, <http://www.reuters.com/article/2011/10/11/uk-global-politics-protest-idUSLNE79A03Z20111011>.)

²⁵² Chris Bowers, *Boing Boing Blacks Out to Protest SOPA and PIPA*, DAILY KOS (Jan. 18, 2011), <http://www.dailykos.com/story/2012/01/18/1056041/-Boing-Boing-blacks-out-to-protest-SOPA-and>

uprisings did not end with the SOPA/PIPA protests, which inspired European opposition to the Anti-Counterfeiting Trade Agreement, with mass protests in Germany, Poland, the United Kingdom, and the Netherlands.²⁵³ There, too, people teamed up through social media, and ultimately succeeded when European Parliament rejected the treaty.²⁵⁴

Returning to the sleeping giant metaphor – when the SOPA/PIPA opposition commenced, the giant was not fully asleep. The global atmosphere was one of social change and worldwide uprisings. The public was thus more attentive, and as discussed below, could easily relate to the protest theme.

ii. SOPA, PIPA, and UGC

The SOPA/PIPA protest succeeded in bringing two bills to a halt. But its maybe greater success has to do with the impressive number of people it mobilized into action. The antipiracy bills seemingly mattered to many, who strove to express their disapproval. Indeed, the fact that this was mostly an online protest made things much easier for the activists, who could act from the convenience of their home. It is also true that twitting about SOPA, emailing a template email to a Congressman through an automated system, or signing an online petition – all represent “low-risk activism,” and does not require sacrifice like traditional “going out to the streets.”²⁵⁵ Yet, any expression of disapproval, even as negligible as “liking” an anti-SOPA post on facebook, accumulates as part of the collective effort, especially when coupled with the vast number of people deviating from their daily routine to communicate their opposition. Moreover, it could very well be the case that the option to object the bills through trivial methods was conducive to the immense level of public participation in the SOPA/PIPA protest. And, as the SOPA/PIPA case proves, low risk activism, when preformed by a sufficient amount of collaborators, is powerful enough to drive a political change.

In light of copyright legislative history the impressive number of copyright activists is somewhat surprising. As mentioned above, copyright legislation has not attracted much attention from the public until the SOPA/PIPA protest. Besides allowing people to be informed as to proposed legislative acts, discuss them with others, and oppose them, the Internet, and especially the rise of UGC, has also given rise to “the Cute Cat Theory of Internet Censorship.”²⁵⁶ The theory suggests that most people use the Internet for trivial and mundane purposes, such as sharing photos of cute cats. If a government decides to censor UGC websites, it would effectively block undesired speech, but also those cute cats pictures – “And even those who could care less about presidential shenanigans are made aware that their government fears online speech so much, that they’re willing to censor the millions of banal videos... to block a few political ones.”²⁵⁷

The cute cat theory as originally presented in 2008 pertains chiefly to developed countries where political censorship is common and accepted, like Iran and China.²⁵⁸

[PIPA?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dailymail%2Findex+%28Daily+Kos%29](http://www.dailymail.co.uk/USNews/article.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dailymail%2Findex+%28Daily+Kos%29).

²⁵³ Dave Lee, *ACTA Protests: Thousands Take to Streets Across Europe*, BBC NEWS (Feb. 11, 2012), <http://www.bbc.com/news/technology-16999497>.

²⁵⁴ Eric Pfanner, *European Parliament Rejects Anti-Piracy Treaty*, N.Y. TIMES (Jul. 4, 2012), <http://www.nytimes.com/2012/07/05/technology/european-parliament-rejects-anti-piracy-treaty.html>.

²⁵⁵ Gladwell, *supra* note 228.

²⁵⁶ Zuckerman, *Supra* note 39. See also Cohen, *supra* note 39.

²⁵⁷ Zuckerman, *id.*

²⁵⁸ *Id.*

Ironically, the application of this theory in U.S. democracy is even more far-reaching, as the right to post a video of one's cute cat is protected under the First Amendment.²⁵⁹ With the rise of web 2.0 the term censorship gets an enhanced meaning.²⁶⁰ Digital tools and mass exposure that were previously reserved for professionals only are now in the hands of countless users, making censorship harmful not only to the acts of professional media, but to any common Internet user wishing to share pictures of her cute cat. The popularity of UGC and its central role as a one-to-many communication tool have narrowed the interests of users during the SOPA/PIPA campaign, and made them clearly-define. So when SOPA and PIPA purportedly attempted to censor the Internet, UGC networks have not only lowered collective action costs and facilitate mobilization, but also helped users to focus on a wide common understanding – that no great firewall is greater than one's facebook wall.²⁶¹

But this is not all. SOPA and PIPA proponents have argued that Silicon Valley industries exploited their power unethically, and misinformed the protesters about the antipiracy bills.²⁶² In other words, according to the bills' supporters, SOPA and PIPA never endangered anyone's free speech, and the future of cute cats' pictures online, as long as they do not constitute copyright infringement, has never been safer. A day before the SOPA strike, SOPA's sponsor, Representative Lamar Smith, condemned Wikipedia and the participants of the planned blackout, saying "This publicity stunt does a disservice to its users by promoting fear instead of facts. Perhaps during the blackout, Internet users can look elsewhere for an accurate definition of online piracy."²⁶³ Chris Dodd, the head of the Motion Picture Association of America, also rebuked SOPA opponents for "resorting to stunts that punish their users or turn them into their corporate pawns."²⁶⁴ Dodd referred to the blackout as an "abuse of power," and warned against manipulation of information by online platforms, which provoke users into action for the benefit of their business interests.²⁶⁵ After the successful blackout and the shelving of the bills, SOPA and PIPA supporters insisted that the public was misguided – "misinformation may be a dirty trick, but it works."²⁶⁶

Social media and Internet platforms, and particularly key platforms like Google's YouTube, Facebook, and Wikipedia, enjoy the power to readily shape public opinion. It could be that some of the information communicated to users during the protest was not utterly accurate. Even so, crediting the purported misinformation for the protest's success is not persuasive. The sources of information in the SOPA/PIPA protest were diverse, and

²⁵⁹ U.S. Const. Amend. I ("Congress shall make no law... abridging the freedom of speech....").

²⁶⁰ The term Web 2.0 refers to collaborative, user-generated content space, which uses the Internet as a software platform. See Tim O'reilly, *What is Web 2.0*, O'REILLY (Sep. 30, 2005) <http://oreilly.com/web2/archive/what-is-web-20.html>.

²⁶¹ The relative silence of the public in CISPA, see *infra*, V(iii) exemplifies that other acts which may be detrimental to the other aspects of online activities, but still allow people to upload cute cat pictures entail less opposition.

²⁶² Sherman, *supra* note 41. See also Chris Dodd, *These Two Bills Are the Best Approach*, N.Y. TIMES (Jan. 18, 2012), <http://www.nytimes.com/roomfordebate/2012/01/18/whats-the-best-way-to-protect-against-online-piracy/these-two-bills-are-the-best-approach>

²⁶³ Carl Franzen, *SOPA/PIPA Supporters Blast 'Blackout Day'*, TPM (Jan. 17, 2012), <http://idealab.talkingpointsmemo.com/2012/01/sopapipa-supporters-blast-blackout-day.php>.

²⁶⁴ A statement by Senator Chris Dodd, Chairman and CEO of the Motion Picture Association of America, Inc. (MPAA) on the so-called "Blackout Day" protesting anti-piracy legislation, THE MOTION PICTURE ASSOCIATION OF AMERICA (Jan. 17, 2012), <http://mpaa.org/resources/c4c3712a-7b9f-4be8-bd70-25527d5dfad8.pdf>.

²⁶⁵ *Id.*

²⁶⁶ Sherman, *supra* note 41.

included news reports from reputable sources (such as the New York Times and CNN),²⁶⁷ numerous blog posts,²⁶⁸ and legal opinions from lawyers and law schools' professors.²⁶⁹ Furthermore, Google and other high-profile websites joined the protest months after Internet advocacy groups started voicing their opposition online.²⁷⁰ Last, among the websites protesting the bills, Wikipedia occupies a singular place as ideological entrepreneur.²⁷¹ Wikipedia is everything the public-service essence of the wide-open Web stands for – “nonprofit, communitarian, comparatively transparent, free to use and copy, privacy-minded, neutral and civil.”²⁷² The decision to black the website was not lightly made, and involved days of discussions and a democratic vote by 1800 Wikipedia editors.²⁷³

It was not the tech industry manipulating their users to promote their business interests. It was neither the users community who called up on Silicon Valley companies to lend them a helping hand in the protest. It was the combination of both, which, among other factors, made the SOPA/PIPA protest so successful. UGC platforms had a clear interest in stopping the antipiracy bills, but UGC platforms were also the platforms through which users shared their cute cats. Thus, users likewise had an interest in preventing the bills from passing. Furthermore, and most importantly, users received their information about the bills, and acted against them via the same channels the bills were purportedly endangering. This state generated alignment of interests between the two groups, which was sufficiently significant to allow joint action towards the ultimate point of victory.²⁷⁴ The alliance between UGC networks and users, however, is compounded of different groups with distinctive sets of interests that may or may not align next time.²⁷⁵

The same applies to the groups themselves – not all users, just as not all UGC platforms, share identical interests. Google's business interest may require a different copyright system than the one envisioned by Wikipedia, and Jane from New York could

²⁶⁷ Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN MONEY (Jan. 20, 2012), http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm (discussing SOPA).

²⁶⁸ In a fascinating talk broadcasted online, Professor Yochai Benkler recounted the SOPA/PIPA protest by mapping the public discourse of the SOPA/PIPA debate online. In his talk, Benkler alludes to many blogs that participated in the opposition, such as technology blog Techdirt and news-sharing platform Reddit. Yochai Benkler, *The networked public sphere: framing the public discourse of the SOPA/PIPA debate*, THE GUARDIAN (May 15, 2012), <http://www.guardian.co.uk/media-network/video/2012/may/15/yochai-benkler-networked-public-sphere-sopa-pipa>. [hereinafter Benkler, *The networked public sphere*]

²⁶⁹ Mike Masnick, *Over 100 Lawyers, Law Professors & Practitioners Come Out Against SOPA*, TECHDIRT (Nov. 15, 2011), <http://www.techdirt.com/articles/20111115/17382616784/over-100-lawyers-law-professors-practitioners-come-out-against-sopa.shtml>. The text of the letter is available at <http://politechbot.com/docs/sopa.law.professor.letter.111511.pdf>. See also Benkler, *The networked public sphere*, *id.*

²⁷⁰ Larry Magid, *SOPA and PIPA Defeat: People Power or Corporate Clout?*, FORBES (Jan. 31, 2012) <http://www.forbes.com/sites/larrymagid/2012/01/31/sopa-and-pipa-defeat-peoples-power-or-corporate-clout/>.

²⁷¹ For a good overview on ideological entrepreneurship see Virgil Henry Storr, *North's Underdeveloped Ideological Entrepreneur*, ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS, Vol. 1 (2008), <http://ssrn.com/abstract=1738823>.

²⁷² Keller, *supra* note 38.

²⁷³ Gardner, *supra* note 77.

²⁷⁴ Benkler, *Seven Lessons*, *supra* note 14.

²⁷⁵ An example for such diversity in interest is found in CISA – The Cyber Intelligence Sharing and Protection Act, H.R. 3523, 112th Cong. (2011), which was supported by UGC platforms like Google and Facebook while advocates of Internet privacy and civil liberties eagerly warned against its consequences to users' privacy. Nevertheless, as of the moment of writing, CISA is still alive. See discussion on text accompanying *infra* notes 276-282.

favor a proposed copyright reform, as opposed to Jessica from Michigan, who would dislike it. It is too early to determine the exact mainspring, but something had cast a spell of perfect consensus within the tech and users' communities during the SOPA/PIPA opposition. It could be that SOPA and PIPA were truly that bad. It could also be that it was the first time a legislative act touched on UGC networks at a time when those networks were so influential, both in terms of lobbying power, and in terms of users' engagement. Either way, first times happen just once, and it is not a given that the alliance between users and tech companies, as well as the consensus within each sector, would reoccur.

iii. A Threshold for Extensive Public Engagement

The SOPA and PIPA opposition was unique. Its success was produced by a combination of factors – some are still unknown. Success in this context is measured not only through the result it brought about, but also through the level of public participation. Nevertheless, it is hard to predict what would be the next controversy to give rise to such sweeping opposition. In fact, while social scientists have been trying to identify the circumstances under which online collective action is likely to be successful (or to fail), no conclusive answer has been agreed on.²⁷⁶ Recent legislative and international endeavors involving Internet uses and intellectual property enforcement, even though widely criticized by Internet advocacy groups and human rights organizations, have not provoked a public outcry close to the one SOPA and PIPA generated. A bill, titled the Cyber Intelligence Sharing and Protection Act ('CISPA'), exemplifies this point.²⁷⁷ CISPA is intended to facilitate investigations of cyber threats by the government and safeguard the security of networks against cyber attack.²⁷⁸ For this purpose, CISPA permits the sharing of cyber threat intelligence between the private and public sectors.²⁷⁹

However, advocates of Internet privacy and civil liberties strongly oppose CISPA, noting that the bill authorizes monitoring of private communications and sharing of personal information with no judicial oversight.²⁸⁰ Trying to invoke the success of the SOPA outcry, opponents of CISPA called it "SOPA 2," and have been impressively striving to enlist the public to fight against the bill.²⁸¹ Even a weeklong campaign, titled "Stop Cyber Spying Week," was announced on April 2012.²⁸² Yet, to date the CISPA opposition has been far less sweeping compared to the one of SOPA and PIPA. It managed to call upon fewer participants, enjoyed less media coverage, and has not yet succeeded in halting the bill, which was introduced in November 2011, and passed the House by a vote of 248 for to 168 against in April 2012.²⁸³

²⁷⁶ Bimber, Flanagan, & Stohl, *supra* note 234, at 371.

²⁷⁷ The Cyber Intelligence Sharing and Protection Act of 2011, H.R. 3523, 112th Cong. (2011).

²⁷⁸ Rules Committee Print 112-20, Text of H.R. 3523, The Cyber Intelligence Sharing and Protection Act (Apr. 19, 2012), http://www.rules.house.gov/Media/file/PDF_112_2/LegislativeText/CPRT-112-HPRT-RU00-HR3523.pdf.

²⁷⁹ *Id.*

²⁸⁰ Trevor Timm, *Cybersecurity Bill FAQ: The Disturbing Privacy Dangers in CISPA and How To Stop It*, ELECTRONIC FRONTIER FOUNDATION (Apr. 15, 2012), <https://www.eff.org/deeplinks/2012/04/cybersecurity-bill-faq-disturbing-privacy-dangers-cispa-and-how-you-stop-it>.

²⁸¹ Cory Doctorow, *CISPA is SOPA 2.0: petition to stop it*, BOINGBOING, (Apr. 10, 2012), <http://boingboing.net/2012/04/10/cispa-is-sopa-2-0-petition-to.html>.

²⁸² Mandy Simon, *Kicking off "Stop Cyber Spying Week,"* AMERICAN CIVIL LIBERTIES UNION (Apr. 16, 2012), <http://www.aclu.org/blog/national-security-technology-and-liberty/kicking-stop-cyber-spying-week>.

²⁸³ H.R. 3523: *Cyber Intelligence Sharing and Protection Act*, Bill Overview, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr3523>.

The Anti-Counterfeiting Trade Agreement ('ACTA'),²⁸⁴ a voluntary plurilateral agreement to internationally bolster up protection and enforcement of intellectual property, was also highly criticized, both for the secrecy in which it was negotiated, and for its content.²⁸⁵ The opposition to ACTA propelled mass protests in Europe, where it was ultimately rejected by the Parliament.²⁸⁶ Yet, even though Internet activists described ACTA as more expansive and worse than SOPA,²⁸⁷ similar mobilizations efforts in the U.S. fail to gain traction. Similarly, the Trans-Pacific Partnership ("TPP"), which is still negotiated between the U.S. and seven other countries,²⁸⁸ is reportedly implementing restrictive copyright measures that go beyond the requirements specified in international treaties.²⁸⁹ Like ACTA, the TPP was discussed in the media and condemned by Internet advocates.²⁹⁰ Still, no SOPA-like opposition has ensued.

As these current examples indicate, the majority of the public is reluctant to fight for the public interest on a regular basis. There is a threshold for an extensive public participation, and this threshold is too high to be passed frequently. In a way, it could be that the SOPA/PIPA protest displayed a peak of public participation, from which more and more people would withdraw, to ultimately leave several groups of activists, who will become repeat players. The extent to which such repeat players would influence copyright legislative process could be fully appreciated only in the future. Nonetheless, it is very unlikely that these groups would manage to sway lawmakers in the way the countless voices of the great public did during the SOPA/PIPA campaign.

The high threshold for large-scale public engagement relates to another concern. The SOPA/PIPA protest had one clear defensive goal – to stop the bills. This goal was easy to set, easy to follow, and easy to determine when accomplished. It is an axiomatic truth, however, that it is much easier to stop legislation from being enacted than to enact it. The required procedure for turning a bill into law includes a few stages of internal consideration.²⁹¹ A proposal must be considered and approved by legislators in congressional committees, presented in hearings, discussed in debates, and eventually be approved by majorities in both houses of Congress. Then, the bill has to be approved by the President, or backed by a veto-override in both houses. SOPA and PIPA made it fairly fast through this process, within the short time of their existence, before being effectively halted

²⁸⁴ Anti-Counterfeiting Trade Agreement (ACTA), Office of the U.S. Trade Rep., <http://www.ustr.gov/acta/>.

²⁸⁵ David Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L. J. 105 (2012).

²⁸⁶ Pfanner, *supra* note 253.

²⁸⁷ See for example, Erik Kain, *If You Thought SOPA Was Bad, Just Wait Until You Meet ACTA*, FORBES, (Jan. 23, 2012), <http://www.forbes.com/sites/erikkain/2012/01/23/if-you-thought-sopa-was-bad-just-wait-until-you-meet-acta/>. See also Cory Doctorow, White House petition to end support for ACTA, BOINGBOING (Jan. 22, 2012), <http://boingboing.net/2012/01/22/white-house-petition-to-end-su.html>.

²⁸⁸ Trans-Pacific Partnership, Off. U.S. Trade Representative, <http://www.ustr.gov/tpp> (last visited Apr. 15, 2012). For a comprehensive description of the partnership see Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27 (2011).

²⁸⁹ Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, DRAKE L. REV. DISCOURSE (forthcoming June 2012), available at <http://ssrn.com/abstract=2054950>. See also *Trans-Pacific Partnership Agreement*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/tpp>.

²⁹⁰ The Electronic Frontier Foundation, *id*, Glyn Moody, *Where TPP Goes Beyond ACTA -- And How It Shows Us The Future Of IP Enforcement*, TECHDIRT (Apr. 6, 2012), <http://www.techdirt.com/articles/20120402/09551618327/where-tpp-goes-beyond-acta-how-it-shows-us-future-ip-enforcement.shtml>.

²⁹¹ See generally, William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1447—48 (2008).

by their foes. Nevertheless, another legislative initiative, which attempts to propose a softer alternative to SOPA, proves that it is not going to be easy to pass copyright legislation anytime soon.

The Online Protection & ENforcement of Digital Trade Act ('OPEN Act') was introduced by Senator Ron Wyden and Representative Darrell Issa on the day of the SOPA strike, January 18.²⁹² The drafters of the OPEN Act apparently succeeded in creating a more balanced approach to online piracy, enjoining wide support, which includes not only some of SOPA and PIPA opponents, but also some of their supporters.²⁹³ The OPEN Act was endorsed by a long list of Tech Corporation, including AOL, eBay, Facebook, Google, LinkedIn, Mozilla, Twitter, Yahoo, and Zynga.²⁹⁴ The only organizations publicly opposing the bill are the Motion Picture Association of America and the Recording Industry Association of America, who were not joined by their SOPA and PIPA allies as the U.S. Chamber of Commerce, and major record labels.²⁹⁵ Understanding the significance of users' input, the sponsors of the bill launched a special website designated for the process of enacting the OPEN Act.²⁹⁶ Through this website visitors were offered to "review the legislation, submit comments, suggest edits and even ask questions."²⁹⁷ Still, as of the moment of writing, the OPEN Act has made very little progress. When compared with SOPA and PIPA, which made it impressively far within less than four months, the OPEN act seems to be extremely slow, with no actions or votes within the seven months since it was first introduced.

The struggles associated with enacting new copyright legislation are also linked to the difficulty to determine what constitutes a public interest and which actions would advance the benefit of the public. Under the public choice theory, legislation that promotes the benefit of interest groups does so at the public's expense.²⁹⁸ Accordingly, detractors of copyright legislative process pointed to the failure to take account of the public interest in proposed legislation.²⁹⁹ Yet, with no understanding of what the public interest is, even if the legislative process exclusively includes public benefit seekers, agreeing on a proposed draft could be proved difficult.

The fate of the antipiracy bills signals that the power to stop a proposed legislation is vital, and – when passes the high threshold of vast public engagement – proved to be effective. However, even when the sleeping giant awakens, if its power to stop harmful legislation is not paired with the power to enact new balanced copyright laws, the old bargains, as fixed in current copyright laws, would remain in effect.

²⁹² The OPEN Act was first announced on a press release on Senator Ron Wyden's website on December 8th, 2011 (*Wyden-Issa Release Draft Digital Trade Legislation*, RON WYDEN (Dec. 8, 2011), <http://www.wyden.senate.gov/news/press-releases/wyden-issa-release-draft-digital-trade-legislation>.) See also H.R.3782 - OPEN Act, OPEN CONGRESS, <http://www.opencongress.org/bill/112-h3782/show>.

²⁹³ *Specific Organizations Supporting H.R.3782*, OPEN CONGRESS, <http://www.opencongress.org/bill/112-h3782/money>.

²⁹⁴ *Letters to Congress*, KEEP THE WEB OPEN, <http://www.Keepthewebopen.com/supporters>.

²⁹⁵ The U. S. Chamber of Commerce, Sony Music Entertainment, and Warner Music Group, were among SOPA and PIPA supporters, Declan McCullagh, *SOPA's most aggressive defender: U.S. Chamber of Commerce*, CNET (Nov. 30, 2011), http://news.cnet.com/8301-31921_3-57334409-281/sopas-most-aggressive-defender-u-s-chamber-of-commerce/.

²⁹⁶ Keepthewebopen.com.

²⁹⁷ Wyden, *supra* note 291.

²⁹⁸ See discussion at *supra* part III.

²⁹⁹ *Id.*

VI. FROM PUBLIC CHOICE TO PRIVATE ORDERING IN COPYRIGHT LAWMAKING

Copyright lawmaking after SOPA and PIPA would not be the same. The political calculus has changed, and it now involves two additional players – the tech industry and the public, and one momentous event in which those actors succeeded in halting copyright legislation. The changed balance of power bears consequences to the application of public choice insights to copyright lawmaking, as well as to alternative channels the various parties may defer to for promoting their interests.

i. Public Choice and Copyright Legislation After SOPA and PIPA

Against the backdrop of the changed balance of power, the public choice analysis, which has been widely applied to explain biases and ambiguities in copyright laws, should be revisited. Through looking at each of the major players in the legislative process – the legislator, the entertainment industry, the tech industry, and the public – this section reviews public choice insights in post SOPA/PIPA era.

Lawmakers: Wishing to advance their rational interests, legislatures remain utility-maximizing players, whose chief ambition is to be reelected. As such, the public choice theory predicts, legislators would be responsive to the intensive lobbying efforts by the entertainment and tech industries. Yet, after the SOPA/PIPA protest legislators are also expected to be alarmed at the possibility of an additional public rise, which explicitly threatens their reelection prospects. As one commentator observed: “the issue's resonance with voters is now undeniable, and members have begun proceeding with caution when considering new legislation affecting digital media.”³⁰⁰

The Tech Sector: The tech industries, as previously mention, have come to realize the rules of the copyright lobbying game. As a centralized group with narrow interests tech companies can effectively organize collective action to sway lawmakers into promoting their benefit. Moreover, as the provider of social media and other public collective action facilitators, the tech industry has substantial control over information diffusion. Whether the tech industry actually uses its control to manipulate users (as some SOPA proponents have argued), or typically employs copyright agenda that sympathizes with users’ needs – the public often sides with Internet companies. Nevertheless, the tech sector is no less susceptible to customers’ boycotts and public opposition than lawmakers. Although it delivers the means for public mobilization, its control over social media is non-inclusive, thus it is not impervious to online protest.³⁰¹ As Internet companies central their business on online traffic, users have been empowering the tech industry, thus the latter has clear incentive in abstaining from provoking unfavorable public reactions. This observation could motivate the tech industries to further present themselves as the public’s ally, promote legislation that does not directly disagree with users’ preferences, or to turn to self-help channels, which can be kept confidential, in case secrecy is needed to avoid public reaction.³⁰²

The Entertainment Industry: The entertainment industry has long been the classic example for how a well-funded group with clearly defined interests can predispose legislators to advance its benefit. Nevertheless, the entertainment industry is no longer the predominant copyright lobby in Washington. While the industry influence cannot be

³⁰⁰ Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987-2012*, 14 YALE J. L. & TECH. 162, 220-221 (2012) (also noting that “this fear is also wrapped in the popular misunderstanding that the major technology industry players are the ones who orchestrated the protests”).

³⁰¹ Mascaro & Goggins, *supra* note 33.

³⁰² See *infra* part VI(ii).

trivialized, it is now facing an equally powerful political competitor, whose copyright agenda is notably different and often stands in opposition to the traditional views of copyright. The entertainment industry, however, enjoys special resistance to public hostility. While the industry may account public criticism, it does not face direct financial risk when the public resists its actions. In this classic case of agency dilemma, ties that are maintained between consumers and their favorite artists (musicians, actors, etc.) do not proceed to the latter's corporate agents. Thus, for example, when a record label sues an individual for illegal file sharing, public opposition would find it hard to boycott the label's products, because that would mean damaging their favorite musician.

The Public: The rise of the public during the SOPA/PIPA events stands in clear opposition to the very basic insights of the public choice model. The public, who supposedly has diffused interests, no centralized financial resources, and who suffers from collective action problems, succeeded in mobilizing and stopping harmful legislation. Social networks have lowered information and organization costs, and are also said to alleviate free-rider problems. The public uprising has not only buried the antipiracy bills but is also said to affect future lawmaking with legislators fearing another backlash. Nevertheless, the public would not extensively stand up against any detrimental legislation, and functions as a sleeping giant who rouses occasionally. The public also lacks clear agenda and concentrated interests, hence is unlikely to regularly engage in collective political action, especially when such action is directed towards promoting as oppose to halting copyright legislation. Smaller public interest groups, however, would now find it easier to form and organize around copyright issues. Such groups would utilize social media to promote their agenda, and due to their limited size would sufficiently share common interests to effectively advance their agenda. The political power of public-interest groups is dependent on their political capital, which, at least currently, does not compare to this of the corporate lobbies.

As the above discussion shows, the new political order in copyright lawmaking has still left some room for public choice awareness. Some aspects of this new state, such as the potential for additional public uprising due to little collective action costs, are inconsistent with public choice insights. Others, such as the fact that the giant is generally asleep, still follow the traditional perceptions of the public choice model. In any case, copyright lawmaking after SOPA and PIPA, when analyzed from a public choice perspective, is better-equipped to produce a more balanced legislation. The arrival of a lobbying power whose agenda typically does not align with the stated objectives of the entertainment industry guarantees representation to a more diversified array of interests in the legislative process. The potential for public rise, even though merely a potential, is still expected to affect the actions of legislator and the other players. And last, lower collective action costs give hope of more civic participation by small public-interest groups, whose influence, while may not be as significant as the one exerted by the corporate lobbies, could still play down some of the inefficiencies in current copyright lawmaking.

ii. Private Ordering and Copyright Policymaking After SOPA and PIPA

The new political order involves a more complicated legislative process, with the sleeping giant looming, and additional participants demanding their share of the copyright pie. The new status would augment previous recourses to private ordering by corporate players. While public ordering is based on centralized governing bodies that generate rules, as the legislature and the courts, private ordering refers to norms formulated by private

parties using decentralized processes.³⁰³ Through private ordering interested parties opt to privatize the rule-making process relating to the use of information, and the legal control as to the public access to information is accordingly delegated to them.³⁰⁴ Deference to private ordering in copyright is not new - a significant strand of copyright scholarship has already identified that corporate rightholders find private ordering more efficient than public policing.³⁰⁵ Private ordering typically counters a failure of public institutions to supply a demanded public good.³⁰⁶ Corporate rightholders have turned to self-help means for similar failures in the copyright market, such as the high costs of lobbying for copyright legislation,³⁰⁷ the insufficient response of public ordering to the challenges posed by new technologies,³⁰⁸ and the expensiveness and uncertainty involved in copyright litigation.³⁰⁹ While legislative endeavors have never stopped, private players used their control over access to information to create private copyright regimes in the shadow of the law.³¹⁰

Private ordering in today's copyright market is conducted through either contractual provisions or technological measures.³¹¹ The software industries, for example, have commonly used adhesion contracts to license mass-market uses. The standardized terms of those licenses were criticized for overriding the default scope of property right set by the Copyright Act.³¹² Contracts, however, were also used to counteract copyright expansion, promote a collective access to information, and encourage sharing of copyrighted works.³¹³ Agreements governing the use of open-source software and licenses of open-access initiatives such as Creative Commons are typical examples for private ordering, which does not promote production and distribution of copyrighted works through proprietary

³⁰³ The definition of private ordering includes many layers, and is still in the midst of a scholarly debate. For the purpose of this paper, I borrowed a simplified definition from Niva Elkin-Koren, who points mainly to the public v. private aspect of such ordering. Niva Elkin-Koren, *Copyrights in Cyberspace--Rights Without Laws*, 73 CHI.-KENT L. REV. 1155, 1161 (1997) [hereinafter Elkin-Koren, *Copyrights in Cyberspace*]. See also Omri Yadlin, *A Public Choice Approach to Private Ordering: Rent-Seeking at the World's First Futures Exchange*, 98 MICH. L. REV. 2620 (2000).

³⁰⁴ Niva Elkin-Koren, *A Public-Regarding Approach to Contracting over Copyrights*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 191, 192 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., Oxford Univ. Press, USA 2001).

³⁰⁵ Cohen, *The New Economic Orthodoxy*, *supra* note 45, at 492.

³⁰⁶ Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6, 6 (1988).

³⁰⁷ See for example, Center for Responsive Politics, *Lobbying, Computers/Internet Industry Profile 2011*, *supra* note 24.

³⁰⁸ Bridy, *supra* note 47, at 83 ("This turn to private ordering and technology-based solutions represents a departure from the dominant strategies of lobbying and litigation that corporate rights owners have pursued domestically since the early days of the digital revolution... None of these efforts, however, made much of a dent in the prodigious volume of illegally traded files").

³⁰⁹ Lev-Aretz, *supra* note 49, at 146.

³¹⁰ Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1200 (2011).

³¹¹ PRIMAVERA DE FILIPPI, COPYRIGHT LAW IN THE DIGITAL ENVIRONMENT: PRIVATE ORDERING AND THE REGULATION OF DIGITAL WORKS, 2 (2012).

³¹² Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 128-33 (1999) (Discussing common license provisions that are likely to be at odds with copyright policy). Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1090 (1998); Samuelson, *Copyright and Freedom of Expression*, *supra* note 49, at 335-36.

³¹³ Séverine Dusollier, *Sharing Access to Intellectual Property Through Private Ordering*, 82 CHI.-KENT L. REV. 1391, 1393-94 (2007).

exclusion.³¹⁴ Rightholders have also employed digital rights management systems, such as encryption, watermarking, and rights permission databases, devised to track, charge for, or preclude uses of digital works by users.³¹⁵

Private ordering in copyright practice has presented itself in three categories of interactions – users-industry relationship (e.g., software digital locks and end-users licensing agreements), inter-industry relationship (e.g., collective rights management organizations and other joint ventures),³¹⁶ and cross-industry relationship (e.g., business partnership between rightholders and broadband providers).³¹⁷ While the use of private ordering in users-industry and inter-industry settings has been widely discussed in legal commentary, private ordering in cross-industry relationships has yet to be studied in detail. It is this form of private ordering, however, that is expected to grow due to the new political order, as the next pages explain. Like other forms of private ordering in copyright, deference to cross-industry partnerships was prompted by the spread of digital media and broadband technology.³¹⁸ The entertainment industry adopted several strategies to fight infringement-enabling technologies – lobbying for legislative reform, litigation, and private ordering in users-industry interactions through copy-protection technologies and licensing.³¹⁹

At first, litigation appeared to be an effective strategy for the entertainment industry, as it initially had “phenomenal success in lawsuits against companies operating file-sharing networks, forcing most of them into shutdown, sale, or bankruptcy.”³²⁰ In 2001, several record labels won a high profile case against Napster, then the predominant peer-to-peer network.³²¹ Additional cases against similar file-sharing platforms Grokster and Aimster were also successfully litigated by the entertainment industries.³²² Nonetheless, subsequent suits against file-sharing networks that restructured their service to meet the law’s requirements did not deliver the same results.³²³ With the instigation of UGC platforms, rightholders began targeting those networks, which were said to facilitate mass infringements. The legal battles on this front, however, did not reciprocate the success of the early file-sharing litigation, and as of writing not even one major case unequivocally favored the entertainment industry.³²⁴ As time went by the entertainment industry has

³¹⁴ *Id.* See also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005) [hereinafter Elkin-Koren, *The Limits of Private Ordering*].

³¹⁵ Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 287 (2003).

³¹⁶ Robert Merges argues that repeat players in high-transaction-cost industries use private ordering in the form of collective rights organizations to effectively substitute their property rights for liability rules, Merges, *Contracting into Liability Rules*, *supra* note 45. For additional examples of joint ventures see also Mukai, *supra* note 46.

³¹⁷ Bridy, *supra* note 47, at 83, Samuelson, *Copyright and Freedom of Expression*, *supra* note 49 at 335-336.

³¹⁸ Chon, *supra* note 48, at 202-203.

³¹⁹ Mukai, *supra* note 46, at 788.

³²⁰ Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 913 (2004).

³²¹ A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2001).

³²² Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. at 919-20 (2005) (ruling against Grokster on grounds of contributory liability for infringement of copyrighted works); In re Aimster Copyright Litigation, 334 F.3d 643, 646 (7th Cir. 2003) (similarly finding a file-sharing service liable on grounds of contributory infringement of copyrighted works).

³²³ Mukai, *supra* note 46, at 785 (also noting that “(i)n response, the entertainment industry has shifted to the direct pursuit of infringement actions against individual file-sharers.”).

³²⁴ The most recent decision in this context is the one delivered in Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)). The court reversed a lower court’s decision granting YouTube’s Motion for Summary Judgment in \$1 billion lawsuit filed against YouTube by Viacom and other media companies. While the last word in this long-lasting saga sides with Viacom, the very last word has yet to be said, and the recent Viacom

realized that the litigation business model does not deliver satisfactory results – not in terms of winning cases, and not in terms of halting piracy.³²⁵ Furthermore, revolving around adversarial courses to fight technology, the entertainment industry failed to make the most of technology as an additional revenue generator.

While the litigation strategy has not been entirely deserted, its limited benefits and high costs have motivated corporate rightholders to engage in private collaborations with Internet intermediaries.³²⁶ They have hitherto partnered with Internet access providers to fight piracy through a combination of digital applications and private law means, e.g., terms of use and acceptable policies.³²⁷ In 2009, for example, Verizon and the Recording Industry Association of America have entered into an agreement under which the former would forward notices of infringement to users, whose IP addresses linked to infringing activity.³²⁸ This agreement is reportedly one of many agreements, some of which require merely passing on infringement notices on behalf of content owners, while some are said to effectuate a graduated response regime.³²⁹ Second Level Agreements, another form of business partnerships I discussed elsewhere, also represents deference to cross-industry form of private ordering.³³⁰ Second Level Agreements are preemptive licenses, under which copyright owners authorize the employment of their content by platforms' users in return for royalties, company stakes, or ad-revenue share.³³¹ Another, less binding method of cross-industry partnership involves a voluntary shaping of best practices through collaboration of various entities. Over the years several sets of agreed principles were festively announced, such as the “User Generated Content Principles,” signed by major copyright holders like Viacom and Disney, and online service providers, like MySpace and Dailymotion.³³² In December 2011, just as the SOPA/PIPA controversy began to heat up, American Express, Discover, MasterCard, PayPal and Visa designed an agreed set of best practices to diminish online sale of counterfeited pirated goods, one of the issues that SOPA and PIPA targeted.³³³

The same process, so it seems, is about to take place in the post SOPA/PIPA legislative arena. The entertainment industry, which has historically had immense influence on the lawmaking process, now has to face the advent of a powerful tech lobby, and the threat of a sleeping giant awakening. The SOPA/PIPA events mark the first time the

ruling has not clearly supported the entertainment industry's views about the liability of UGC platforms. In another recent case, *UMG Recordings Inc. v. Veoh Networks Inc.*, 667 F.3d 1022 (9th Cir. 2011), the court upheld Veoh's safe harbor defense under the DMCA.

³²⁵ WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS*, 26 (Oxford University Press, Inc.) (2009).

³²⁶ Bridy, *supra* note 47, at 83; Lev-Aretz, *supra* note 49 at 166.

³²⁷ Bridy, *supra* note 47, at 82-83.

³²⁸ *Id.*, at 101.

³²⁹ *Id.* See also Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374 (2010) (“Similar to other “three strikes and you're out” systems that are commonly found in the United States, the graduated response system provides an alternative enforcement mechanism, through which ISPs can take a wide variety of actions after giving users two warnings about their potentially illegal online file-sharing activities. These actions include, among others, suspension and termination of service, capping of bandwidth, and blocking of sites, portals, and protocols.”)

³³⁰ Lev-Aretz, *supra* note 49.

³³¹ *Id.*, at 152.

³³² Principles for User Generated Content Services, <http://www.ugcprinciples.com>.

³³³ Amy Chozick, *Tech and Media Elite Are Likely to Debate Piracy*, N.Y. TIMES (Jul. 9, 2012), http://www.nytimes.com/2012/07/10/business/media/tech-and-media-elite-are-likely-to-debate-piracy.html?_r=3&ref=business&pagewanted=all.

entertainment industry encounters confrontation with both groups and lose. Following the SOPA/PIPA events, executives in the entertainment industry conceded that they must “find a solution that works better for everyone.”³³⁴ Concurrently, others in the industry have voiced their doubt as to the probability of future statutory reform, referring to the legislative route as “no longer appealing or practical.”³³⁵ And just as recent years of litigation have led rightholders to the realization that litigation alone is an inapt business model, the appreciation of the new political order is expected to drive the entertainment industry to further explore cross-industry partnerships. After all, such partnerships could save the industry some of its high lobbying and litigation expenses, enable better and quicker adaptation to new technologies, and offer new business opportunities to replace traditional distribution models with contemporary ones.

At this point, the interesting question would refer to the incentive of the tech industries to partake in private ordering through cross industry partnerships. If public ordering signals that the tech sector is the new sheriff in town, the tech industry has arguably no incentive to resort to private arrangements, where it would have to find a happy medium with its rivals. The answer is simple – first, the tech industry is not the new sheriff in town, and second, cross-industry partnerships make better economic sense than litigation or legislation, especially for Internet service providers. Given the traditional significance of the entertainment industry in the legislative process, the tech industry, irrespective of its growing power, would still have to face a rigorous adversary. Furthermore, the tech industry used its muscle to halt harmful legislation, a course which, as discussed above, is simpler than promoting a beneficial statutory mandate. And while the SOPA/PIPA protest provided an applauding display of the tech sector power in the legislative arena, lobbying is a dear business. Private ordering through cross-industry partnerships, thus, could save some of the industry’s lobbying expenditure. The Internet industry also regularly produces technology changes that challenge copyright laws. Addressing such changes through lobbying entails, in addition to the financial investment, valuable time that the tech industries often cannot afford. And while it is usually unlikely for a party to sue another party with whom the former engage in a business partnership (or in negotiation towards one), nothing holds entertainment companies from suing tech players concurrently to common lobbying efforts. The responsiveness of private ordering to market changes is carried on through the life of the partnership - after the terms of a partnership are stipulated and agreed upon, future adjustments, minor or major, could also be done quickly and efficiently through private ordering.

The tech industry has already found private ordering via cross-industry partnerships more efficient and more effective than litigation. The goal of the DMCA, the main statute governing Internet service providers in the copyright context, is to “preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”³³⁶ To put the point slightly differently, the legal framework within which many in the tech industry operate was design to motivate cross-industry partnerships. The safe harbors provisions of the DMCA shields webhosts from monetary liability for infringement committed by users, as long as they adopt and reasonably implement certain policies for the removal of infringing

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Bridy, *supra* note 47, at 83.

content following a rightholder's request.³³⁷ While these requirements are not mandatory, virtually every commercial website hosting or otherwise dealing with copyrighted content in the U.S. endeavors to comply with them to enjoy the safe harbors' protection.³³⁸ Nonetheless, the exact application of the safe harbors provisions has been a source of much controversy.³³⁹ Together with the potential damages exposure, the uncertainty surrounding the safe harbor requirements, and the high costs of litigation have given Internet service providers a cogent motivation to safeguard themselves against litigation through business partnerships with rights holders.³⁴⁰ Tech players have thus opted to cross industry partnerships as a form of insurance against expensive and uncertain litigation, which has pauperized Internet companies in the past to a point of bankruptcy.³⁴¹

Cross industry partnerships have also been of value to tech players as those partnerships represent new business opportunities, which couldn't have been carried out independently. For example, Second Level Agreements allowed UGC networks to capitalize on high-quality premium content, which could not have been provided legally otherwise. The importance of cooperation in the modern knowledge-based economy has turned the boundaries between industry and market segment flexible and easy to overcome - adversaries in one market sector could join forces in another.³⁴² Accordingly, the Internet industries, which have already been incentivized to partner with copyright holders, find themselves doing business with the same rightholder who they currently fight in court with.³⁴³

Cooperation among dominant industry players empowers private ordering to be as far-reaching and forceful as public legislation. As Merges has rightfully observed "a dominant contractual form can operate as a form of 'private legislation' that restricts federally conferred rights every bit as much as a state statute."³⁴⁴ The number of Google searches per day is over 4.7 billion;³⁴⁵ Google's YouTube has over 800 million users visiting each month;³⁴⁶ Facebook has near 1 billion active users;³⁴⁷ and 273.1 million people in the

³³⁷ Helman and Parchomovsky, *supra* note 309, at 1196.

³³⁸ Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 234 (2009).

³³⁹ *Id.*

³⁴⁰ Briday, *supra* note 47, at 85.

³⁴¹ Even though Veoh prevailed in two cases brought against it on grounds of copyright infringement, the expensive litigation costs were a predominant cause in the company's bankruptcy filing. Helman and Parchomovsky, *supra* note 309, at 1208.

³⁴² Keith Porcaro, Private Ordering and Orphan Works: Our Least Worst Hope?, 2010 Duke L. & Tech. Rev. 15, 31 (2010) ("Google's YouTube and Maps services are prominently featured on the iPhone, even while Google launches a competing smartphone operating system.").

³⁴³ YouTube, who has content partnership agreement with Viacom, is being sued for \$1 billion by the very same Viacom. *Viacom Intern. Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 95 U.S.P.Q.2d 1766 (S.D. N.Y. 2010), *aff'd in part, vacated in part*, 676 F.3d 19 (2d Cir. 2012). Just a day before the Second Circuit Court of Appeals reversed the lower court decision in favor of YouTube, YouTube and Viacom have announced partnership to offer online rentals of Paramount films, whose owned by Viacom, Brian Stelter, *Appeals Court Revives Viacom Suit Against YouTube*, N.Y. TIMES, (Apr. 5, 2012), <http://mediadecoder.blogs.nytimes.com/2012/04/05/appeals-court-revives-viacom-suit-against-youtube/>.

³⁴⁴ See Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian World" of On-line Commerce*, 12 BERKELEY TECH. L.J. 115, 126 (1997).

³⁴⁵ Google *Annual Search Statistics*, STATISTIC BRAIN, (Date Verified: 7.14.2012) <http://www.statisticbrain.com/google-searches/>.

³⁴⁶ *YouTube Statistics – Traffic*, YOUTUBE PRESS ROOM, http://www.youtube.com/t/press_statistics/.

³⁴⁷ David Goldman, *Facebook tops 900 million users*, CNN (Apr. 23, 2012), <http://money.cnn.com/2012/04/23/technology/facebook-q1/index.htm>.

U.S. use broadband providers to connect to the Internet.³⁴⁸ The behavior of all of those users, and the terms of use under which they access any informational service, are regulated by the infrastructure that facilitates their access.³⁴⁹ Against this backdrop deference to private ordering when the legislative arena gets too chaotic makes perfect sense for both tech and entertainment industries.³⁵⁰ Indeed, copyright legislation was never easy to pass, and industry players have already deferred to private ordering for this reason. Nevertheless, the new political reality not only guarantees that copyright legislative process has been further complicated, but also that the new players would rarely be able to advance their interests in copyright lawmaking independently of each other. Acting as a form of private lawmaking, cross-industry partnerships could produce an effect similar to public lawmaking while avoiding many of the inefficiencies the latter implies, including those explained by the public choice theory.

Through private ordering dominant industry players can also partner to settle copyright conflicts using privately negotiated regimes with confidential procedures. Many of SOPA opponents pointed to apocalyptic scenarios about the government shutting down websites like Wikipedia and Facebook. Yet, they all conceded that such scenarios, while could happen, are extreme and uncommon.³⁵¹ Similarly, contractual agreements between industry players could encompass objectionable rules; yet, by the time one of the disturbing scenarios would have harmed a sufficient amount of people to meet the threshold for extensive public protest, the agreement could be in effect, meanwhile impacting marginal cases, the fate of which is not of the mainstream social interest. To demonstrate this point, one could look at the removal of a video, featuring various superstars purporting to endorse Megaupload, the recently closed file-sharing website, from YouTube, following a request from Universal Music Group.³⁵² Even though some popular Universal artists appeared on the video, it only contained original content. MegaUpload has brought legal action against Universal, alleging that Universal had misused the content takedown system set out by the DMCA.³⁵³ Universal, however, argued it has not exploited the DMCA takedown system. Instead, it was claimed, Universal has a contractual agreement with YouTube that allows use of a "Content Management System" to take down content from the site "based on a number of contractually specified criteria."³⁵⁴ As this example shows, socially disruptive provisions that effectively censor speech based on market-preferences could be kept secretive, until, if at all, an interested party, who is powerful enough to make the story spread, reveals it.

³⁴⁸ *Internet Usage Statistics for the Americas*, INTERNET WORLD STATS (Dec. 31, 2011), <http://www.internetworldstats.com/stats2.htm>.

³⁴⁹ Elkin-Koren, *Copyrights in Cyberspace*, *supra* note 302.

³⁵⁰

³⁵¹ Keller, *supra* note 38.

³⁵² Surat Lozowick, *Copyright enforcement gone wrong: Universal takes down a song it doesn't own*, THE NEXT WEB (Jan. 28, 2012), <http://thenextweb.com/insider/2012/01/28/universal-music-group-youtube-copyright-enforcement-gone-wrong/>.

³⁵³ In the wake of MegaUpload being shut down on piracy charges by the United States Department of Justice, the company's lawyers recently filed a notice to dismiss the claims against UMG without prejudice. David Kravets, *Megaupload Drops Universal Lawsuit to Focus on Criminal Charges*, WIRED (Mar. 29, 2012), <http://www.wired.com/threatlevel/2012/03/megaupload-focuses-on-charges/>.

³⁵⁴ Eriq Gardner, *Universal Music May Have Inadvertently Exposed a Flaw in the YouTube Takedown Process*, THE HOLLYWOOD REPORTER (Jan. 27, 2012), <http://www.hollywoodreporter.com/thr-esq/megaupload-youtube-lawsuit-universal-music-285298>.

The choice between norms and law as a tool of social governance has occupied many commentators.³⁵⁵ Some have argued that resources are most efficiently allocated in the private marketplace, especially against the backdrop of public choice problems, and that private ordering best shields individual freedom.³⁵⁶ Others have asserted that private norms will typically not optimize efficiency, since they stem from conditions that do not conform the classic model of perfect competition.³⁵⁷ The cross-industry partnerships model also involves at least one market failure in the form of asymmetry of information – users are widely affected by private arrangements that are typically surrounded with opacity – and may result in other negative externalities.³⁵⁸ While the question of government intervention in cross-industry forms of private ordering (through antitrust laws, for example) exceeds the boundaries of this Article, such intervention was ironically pointed at as suffering the same public choice deficiencies that engendered the resort to private ordering in the first place.³⁵⁹

VII. CONCLUSION

When SOPA and PIPA were introduced, no one could have imagined, that soon thereafter, the debate would turn from arcane policy discussion to one of the greatest online revolt in copyright history. The SOPA/PIPA protest confirmed the emergence of a new political order, which initially appears to contradict a well-established line of commentary applying the public choice theory of legislation to copyright lawmaking. The public choice theory in this context views copyright legislation as a direct response to the lobbying efforts of the copyright industries. As copyright laws were formulated via negotiation between interest groups, only those with well-defined interests, who are effectively organized and substantially financed, could find their benefit secured in the resulting legislation. Larger groups with diffuse interests suffer high collective action costs that prevent them from effectively forming a group and mobilizing into political action. Accordingly, corporate rightholders, mostly the entertainment industry, successfully advocated for richer rights in information; less dominant, but still well-organized entities, such as academic institutions and libraries, were given specific exemptions, and the voiceless public remained largely unrepresented.

This Article revisits the public choice theory in copyright lawmaking by in light of the SOPA/PIPA events, by first pointing to the technological, political, legal, and social changes that paved the way to the successful protest. The rise of a powerful technology lobby, whose copyright views are less extremes than those expressed by the entertainment industry, has been undoubtedly a game changer in copyright politics. In this sense, the rise of social media has further strengthened the newly vested power of the tech lobby. Social networks, however, have also allowed users to economize on collective action costs, and overcome free riders problem. The news about the bills diffused instantly, spawning rage and generating mass protest, the organization of which was effectively conducted through social media as well.

³⁵⁵ Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 846 (1999).

³⁵⁶ Macey, *Public and Private Ordering*, *supra* note 52, at 1124; John J. Costonis, *Casting Light on Cultural Property*, 98 MICH. L. REV. 1837, 1839 (2000).

³⁵⁷ Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1749 (1996). Katz is careful to add, however, that because state-set norms may suffer from the same limitations, a priori there is no basis for preferring public or private lawmaking.

³⁵⁸ For a comprehensive discussion on the externalities embodied in private ordering in copyright see De Filippi, *supra* note 310, at 101.

³⁵⁹ Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004).

The Article then continues to analyze the status of the public within the new political reality of copyright lawmaking, through discussing three unique attributes of the SOPA/PIPA – the historical context of the protest, and especially the global public rise of 2011; the threat SOPA and PIPA posed to UGC, which not only led eager users to protect their free speech right to post pictures of cute cats, but also generated an alliance with UGC networks; and the high threshold for extensive public participation, passed successfully when SOPA and PIPA were at stake, but not when other controversial proposals (e.g., CISPA, ACTA, and the TPP agreement) are promoted, and also not for the purpose of actively advancing beneficial legislative initiatives (e.g., the OPEN Act). Consequently, this Article concludes that after SOPA and PIPA the public should be viewed as a ‘sleeping giant,’ who would not be regularly active in copyright legislative debates, but may arouse occasionally with great might.

Copyright lawmaking after the SOPA/PIPA uprising accounts for a new political calculus. Through reevaluation of public choice insights in light of the new balance of power, this Article submits that while legislative attempts would surely continue through a more diversified course, previous deference to private ordering is expected to increase. Future legislative attempts will be far more complex than before, with more players in the field and lawmakers alarmed by the possibility of another uprising. Consequently, the entertainment industry and the tech sector are expected to resort to private ordering. While legal commentary has identified recourses to private ordering in users-industry and inter-industry interactions, little has been said about cross-industry partnerships. It is this form of partnership, however, that the changes in the legislative arena are expected to enhance. Such partnerships make perfect economic sense for private players, as they are simpler to conclude, faster, involve less transaction costs, confidential, and responsive to future changes. Furthermore, the reach of the cross-industry form of private ordering could resemble the one of enacted legislation, only without many of the inefficiencies the latter involves, including those pointed to by the public choice theory.